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PROCEDURE IN SUMMARY CASES *

A Survey of Canons 1990-1992 and Articles 226-230 of the Instruction, Provida

I. The Historical Background of Canon 1990

SINCE the special problem envisaged in this monograph refers to the exercise of jurisdiction, we must clearly distinguish, at the very outset, between judicial and non-judicial jurisdiction. Due to somewhat variant terminology, the juridical and philosophical nature of the distinction is not always clearly indicated by Canonists and Moral Theologians. The confused notions and somewhat arbitrary divisions are due in part, at least, to the different concepts between Roman and Canon Law in this matter. Roman Law distinguished between judicial and voluntary jurisdiction. However, legislative power was not ordinarily included in the concept of jurisdiction in Roman Law, whereas it is thus implied in Canon Law. The Code has retained the Roman Law terminology (which is not too strictly adapted to Canon Law), simply because it has the sanction of common usage and is time honored in the monumental works of Schmalzgrueber, Reiffenstuel, Pirhing, Sanchez, and others. Variant interpretations and diverse divisions of jurisdiction have arisen from this discrepancy.

Jurisdiction may be considered as judicial or non-judicial. Non-judicial jurisdiction, which is also called non-contentious

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or voluntary, may be divided in turn into legislative, administrative, and punitive jurisdiction. The basis for the distinction between judicial and non-judicial jurisdiction is not only the nature or source of the power nor even the object toward which it is directed, but even more specifically the very nature of the act as well as the manner or form in which the jurisdiction is exercised. Thus, strictly judicial jurisdiction is that which is exercised with the exact observance of the essential formalities of legal procedure. The act resulting therefrom is set forth in a sentence, either interlocutory or definitive. An interlocutory sentence is one which defines an incidental case; whereas, the definitive sentence decides the principal issues. Legal redress admitted against such a sentence is called an appeal. Hence, appeal and sentence are usually correlative terms and connote the fulfillment of complete judicial formalities in a case.

Contrariwise, non-judicial, voluntary or administrative jurisdiction is exercised when the complete and strict formalities of a judgment are not observed in entirety. The act issued in virtue of the exercise of this power is called a decree. Legal redress against such a decree is usually termed recourse. As a result, the terms recourse and decree ordinarily imply the exercise of non-judicial or administrative jurisdiction. With these preliminary considerations clearly in mind, we are now prepared to view the historical background of Canon 1990.

To understand the historical beginnings of this particular Canon it is necessary to go back as far as the Constitutions, *Dispendiosam*,[1] and *Saepe*,[2] of Pope Clement V (1305-1314). These Constitutions abridged certain forms of judicial trials, including matrimonial cases, and in their stead authorized a summary judicial process. This process was definitely not administrative; but merely authorized a curtailment of certain legal formalities and detailed requirements, while insisting on necessary proofs and legal defense. Four centuries later, on November 3, 1741, Pope Benedict XIV issued the Constitu-

[1] C. 2, *De judiciis*, II, 1, in Clem.

[2] C. 2, *De verborum significatione*, V, 11 in Clem.

tion, *Dei miseratione,*[3] in which he revised the judicial procedure for matrimonial cases and emphasized the need of two concordant sentences before the invalidity of the marriage bond could be juridically admitted, even in cases of evident nullity. Gradually, however, the stringent requirements of the judicial process demanded by this Constitution were modified in cases of obvious and patent nullity,[4] and faculties were even granted to certain Bishops authorizing a summary trial with the intervention of the *Defensor Vinculi.*[5]

It is of primary importance to note that in the foregoing instances there was never a change from the judicial to an administrative process; but merely an abridgment of some of the judicial formalities. The legislation of the Holy See authorized a more expeditious handling of matrimonial cases; but the judicial nature of the process always remained intact.

The nearest approach to the present-day structure of Canon 1990 is found in a general decree of the S. C. of the Holy Office of June 5, 1889. Incidentally, it may not be amiss to state here that the famous phrase is found in this Decree: "*praetermissis solemnitatibus in Constitutione Apostolica Dei miseratione requisitis.*" [6] This general decree permitted that where the existence of the impediments of disparity of cult, ligamen, consanguinity, affinity from lawful intercourse, spiritual relationship, or the impediment of clandestinity could be proved by a certain and authentic document or by certain arguments adduced to show that the aforementioned impediments had existed and were not dispensed from, then the Ordinary could

[3] Benedictus XIV, Const. *Dei miseratione,* 3 Nov. 1741—*Fontes,* I, n. 318.

[4] Benedict XIV allowed the nullity of a marriage to be considered established after one sentence had been given by the Sacred Congregation of the Council. Benedictus XIV, decr. *Esti matrimonialis,* 25 Sept. 1755—*Bullarium,* III, pars. II, p. 287.

[5] S. C. S. Officii (Ep. Wayne-Castren.) 20 Martii, 1899—*Fontes,* IV, n. 1114; *Thesaurus,* XVIII (1754), pp. 25, 33; *N. R. T.,* XX (1888), 624, 633; XXVI (1894), 26; Roskovany, *Matrimonium in Ecclesia Catholica,* I, 294; Bassibey, *Le Marriage,* 35.

[6] S. C. S. officii, decr., 5 Junii 1889—*Fontes* IV, n. 1118; *Coll.* II, n. 1706; *ASS.,* XXVI (1889), 639.

omit the solemnities required by the Constitution, *Dei miseratione* and, with the intervention of the *Defensor Vinculi*, could declare the marriage invalid. In such cases even a second concordant sentence was not required. As will be readily seen, this decree forms the basis on which Canon 1990 was eventually formulated. That it was a general decree is clear from a reply of the S. C. of the Holy Office of February 14, 1894.[7]

II. The Judicial Character of the Summary Process

A. PRE-CODE LEGISLATION

It is to be noted that the greater latitude permitted by the Holy See to facilitate the expeditious settlement of matrimonial cases did not involve any substantial change in the nature of the process. The power exercised had been previously judicial and the mind of the Holy See was that it was to remain as such. This is evident from a reply of the S. C. of the Holy Office to the Bishop of Albany on June 10, 1896. The Holy Office therein distinguished between the pre-nuptial investigation on the one hand, and on the other, the ascertainment of the existence of an impediment previous to the formal declaration of the nullity of a pre-existing marriage. In the former case the investigation could be made by anyone (either priest or layman) in an extrajudicial manner without any special delegation. In considering the latter case, however, the S. C. of the Holy Office specifically refers to its response to the Bishop of Fort Wayne of March 20, 1889,[8] and to its general decree of June 5, 1889,[9] and states that the solemnities of the Constitution *Dei Miseratione* may be omitted; but that the *substantial form* of the judicial process must be retained, with the intervention of the *Defensor Vinculi*: "*semper tamen forma judicialis quoad substantialia servari debet, cum interventu defensoris vinculi matrimonialis.*" In

[7] "An decretum S. O. 5 Junii 1889, quo in nonnullis causis matrimonialibus derogatur solemnitatibus Constitutionis Benedictinae, sit GENERALE necne. R. Affirmative."—*Fontes*, IV, n. 1168; *Coll.* II, p. 237, nota 1.

[8] S. C. S. Officii (Ep. Wayne-Castren.), 20 Martii 1889—*Fontes*, IV, n. 1114.

[9] S. C. S. Officii, decr. 5 Junii 1889—*Fontes*, IV, n. 1118.

order to obviate all possible doubts in the matter, the same response immediately repeats the solemn injunction that in substance the form of a judicial trial is to be preserved:

> "Planum est ex iis deducere quod in hoc secundo casu semper requiritur forma iudicii, quoad substantialia, nec non interventus defensoris vinculi matrimonialis; quod profecto praestari a nemine poterit, nisi prius habita speciali ac regulari delegatione."[10]

This response of the Holy Office is so clear and emphatic that certainly no one could have been in doubt about the nature of the process as it existed in 1896. Wherefore it can be safely deduced that in 1896 this process was definitely and unqualifiedly judicial. Unless there is some equally clear and emphatic legislation of a later date, the presumption is naturally that the mind of the Holy See continued to be that the power exercised in such processes remained judicial. Research and investigation indicate that no change was made by the Holy See up to the time of the Code. Hence, at the time immediately preceding the promulgation of the Code, the process appears to be indubitably judicial.[11]

2. CODE LEGISLATION

It is not within the scope or purpose of the present monograph to enter upon a detailed discussion of the controversy that exists as to the precise characer of the process.[12] Authorities of great prominence are ranged on both sides and the end of the controversy is not yet in sight. Our avowed purpose is not to stray out upon this battleground, but we wish merely to enumerate a few of the reasons that lead us to be-

[10] S. C. S. Officii (Albanen. in America), 10 Junii 1896—*Fontes,* IV, n. 1180; *Coll.* II, n. 1940.

[11] Wernz, *Jus Decretalium,* IV^2, n. 748.

[12] Excellent studies have been made of this controverted question: Kay, *Competence in Matrimonial Procedure* (Washington, 1929); Kennedy, *The Special Matrimonial Process in Cases of Evident Nullity* (Washington, 1935); Johnson, *"De natura processuum matrimonialium exceptorum"—Appollinaris,* IX (1936), 377.

lieve that the process continues to be judicial, according to its historical, traditional and juridical lines.[13]

In view of the historical background of Canon 1990, and the norms established by Canon 6, 3 ° and 4 °, it would appear that the character of the process has remained fundamentally and substantially judicial even after the promulgation of the Code. On strictly historical and juridical grounds it is difficult to find reasons to warrant any change of opinion. Hence, we are inclined to believe that it is a judicial process of an exceptional character.

1. *Position of Canon 1990 in the Code.*

The very position of Canon 1990 in the Code would seem to indicate that the mind of the Legislator was that the process was to remain judicial. The procedure outlined in Canons 1990-1992 is indeed summary and exceptional; but there is no irrefragable evidence to indicate a change of its strictly judicial character. There is a portion of Book IV (Canons 2142-2194) which outlines administrative processes, but this distinctive section would but seem to emphasize the judicial character of the process envisaged in Canon 1990.[14]

[13] A statement of one of the Sentences of the S. R. Rota is very interesting, since it is therein averred that the procedure is manifestly merely administrative. Obviously, such is the opinion of the Auditors of the *Turnus* giving this Decision. *Quae procedura manifesto est mere administrativa, cum omnino abstrahat a sollemnitatibus processus judicialis, et licet matrimonii nullitatis declaratio ab Ordinario pronuntiata vocetur sententia, non agitur de vera sententia.—S. R. Rotae Dec.*, XXIII (1931), 252, n. 5 (Wynen, Heard, Janasik). Instruction of S. C. Sacr. of July 1, 1929 (Art. 34 of the Concordat) states in Art. 49 referring to Summary Process as Administrative or economical, i.e. *"Il corso giudiziario, sia quello amministrativo o economico* (Can. 1990)"—*AAS*, XXI (1929), p. 361.

[14] There are other processes mentioned in the Code concerning matrimonial questions that are clearly administrative, such as:

1. The formalities to be observed in the pre-nuptial investigation of freedom to marry (Canons 1019-1034), for there is no question of a contentious case in such matters.

2. The formal declaration of the lack of canonical form as envisaged in Article 231 § 1 of the Instruction, *Provida*, since there is not even a *"species veri matrimonii"* in such cases.

2. *Terminology Employed by the Code and the Instruction.*

We do not assert that the terminology of Canon 1990, when taken alone, would indubitably and exclusively prove the judicial character of the process. However, we are inclined to believe that there is no positive evidence in the language of Canons 1990-1992 to indicate in any way that what had been consistently and historically a judicial process, was changed by the Code to one that was merely administrative.[15]

When one considers Articles 226-230 of the Instruction, *Provida,* of the S. Congregation of the Sacraments of August 15, 1936,[16] one discovers certain unmistakable indications that the nature of the process is fundamentally judicial.[17] The terminology employed in the Instruction and the structure of the Articles seem to confirm this opinion, as shall be pointed out later. Consequently, our treatment of this process views it as judicial. But in stating this opinion we are not at all oblivious of or lacking in deference to the great authority of those who advocate that this process is purely administrative.

III. The Impediments Envisaged in Canon 1990

A. THE SEVEN IMPEDIMENTS LISTED IN CANON 1990

Canon 1990 authorizes the summary process only in cases involving the following seven impediments:

1. Disparity of worship.
2. Holy Orders.
3. Solemn vow of chastity.
4. *Ligamen.*

3. The process observed to establish presumed death of a consort (Canons 1042, 1053, 1069, § 2), since this is merely an investigation of the fact of the existence of a former marriage.

4. The separation of consorts (Canons 1128-1132), since the bond of marriage is not in jeopardy.

15 Johnson, "De natura processuum matrimonialium exceptorum"—*Appollinaris,* IX (1936), 377.

16 S. C. Sacr. Instructio, 15 Augusti 1936—*AAS,* XXVIII (1936), 312-370.

17 Kay, "Canon 1990 and the S. C. S. Instruction of August 15, 1936, on Matrimonial Procedure"—*AER,* XCVIII (1938), 262-270.

5. Consanguinity.
6. Affinity.
7. Spiritual relationship.

B. THE *Taxative* ENUMERATION OF THE IMPEDIMENTS IN CANON 1990

In passing, it might not be amiss to draw attention to the fact that the enumeration of the seven impediments appears to be final, exclusive and definitive, i.e., the impediments are enumerated *taxative*. This is the general opinion of authors.[18]

Some authors, it is true, favored the opinion that cases involving the impediments of age, legal relationship, public decency and conjugicide could also be tried in the summary process. However, a Letter of the Apostolic Delegate to the Ordinaries of the United States, dated September 23, 1938, embodying the teaching of the S. Congregation of the Sacraments, states: " It must be remembered that the impediment of age cannot be handled according to the norms of Canon 1990, since this impediment is not included in the *taxative* enumeration of the impediments " (Letter, No. 151/35, n. 5). Nevertheless, Cappello holds the opposite opinion in the fourth edition of his work published in 1939.[19]

C. VERIFICATION OF THE EXISTENCE OF IMPEDIMENTS

When a case is presented to a tribunal, the first task is to ascertain the existence of a true impediment. This will obviate many difficulties and save a good deal of time. In drawing up the case, the Bishop or the *Officialis* should form clear notions of the precise nature of the particular problem involved. At times futile investigations are made and useless ramifications of cases are examined, simply because the preliminary study of a case was not made with a clear understanding of the particular difficulty involved.

[18] Wernz-Vidal, *Jus Canonicum*, V, n. 704, p. 842; Chelodi, *Jus Matrimoniale*, n. 180, p. 195; De Smet, *De Matrimonio*, II, n. 702 *bis*; Coronata, *Institutiones*, III, n. 1501, p. 439; Vlaming, *Praelectiones*, II, n. 804, p. 387.

[19] *De Sacramentis*, III, Pars. II, n. 891, p. 448.

The second task of the Bishop or the *Officialis* is to discover whether or not the impediments enumerated in Canon 1990 really exist in the case under consideration. If the preliminary investigation clearly and indisputably proves that none of these seven impediments exist, it is obviously futile to attempt to handle the case according to the summary process. If the marriage appears to be invalid for some other reason, the case should be straightway remanded to the collegiate tribunal for trial in formal process.[20]

D. PROPER INVESTIGATION OF THE POSSIBILITY OF THE CESSATION OF IMPEDIMENTS

1. *Dispensation.*

A dispensation from a diriment impediment is a lawful act of a superior by which the obstacle, prohibiting marriage under pain of nullity, is removed in a particular case. When cases are being examined, the Bishop or the *Officialis* should always bear in mind the possibility of a dispensation from the diriment impediment involved. Ordinarily, the parties are not likely to know about the existence of dispensations granted them. If they are pressing the claims of invalidity in bad faith they will do everything in their power to conceal the fact of the existence of a dispensation, even when they are aware of its significance. Consequently, the Bishop or the *Officialis* should keep in mind the possibility of the following contingencies:

1. Dispensation granted in the ordinary way at the time of the marriage, even though a record may not be found.
2. Dispensation in danger of death according to the norms of Canons 1043 and 1044.
3. Dispensation in urgent cases as provided for in Canons 1045 and 1046.
4. Dispensations recorded in the secret archives of the Curia, as envisaged in Canon 1047.

[20] All of the problems mentioned in this monograph are treated in detail in the Author's forthcoming Volume II of *Canonical Procedure in Matrimonial Cases* (Bruce, Milwaukee), which is expected to be published within a few weeks.

5. Dispensation granted in extraordinary cases and in the exceptional circumstances referred to in Canon 81.

2. *Convalidation.*

As explained in previous chapters, the Ordinary or the *Officialis* should bear in mind the possibility or probability of a convalidation. A careful study of each individual case and the sagacious questioning of the parties and witnesses will usually be sufficient to reveal the exact status of the case.

3. *Sanatio in Radice.*

A marriage may have been unquestionably invalid at the time it was contracted. Nevertheless, there is a possibility or even the probability in some cases that a *sanatio* may have been granted afterwards. Experience proves that at the time of a mission, of illness and the like, there are cases of *sanatio in radice.* This possibility should be remembered and should be duly investigated if the case warrants. It should also be borne in mind that one or both parties may be ignorant of the fact that a sanation had been graned.[21]

IV. Proofs Required in Summary Cases

A. DOCUMENTARY PROOF

1. *Requisies of Documentary Proof.*

Since the cases envisaged in Canons 1990-1992 are to be handled in a summary manner, the detailed requirements of the formal process are to be waived except in those points that the Canons indicate. These cases are exceptional and are to be treated as such.

1°. Certain and Authentic Document Required.

The Code declares that the summary or informal process may be used whenever the existence of one of the impediments enumerated in Canon 1990 is clear from a certain and authentic document. A document is ordinarily defined as any writing from which a fact can be proved. Such a document may be:

[21] Can. 1138, § 3.

1. *Public,* when duly drawn up by a public personage in the proper exercise of his office and solemnized by the proper legal formalities. A public document may in turn be:

A. *Ecclesiastical,* when duly drawn up by an authorized ecclesiastical official.

B. *Civil,* when duly drawn up by an authorized civil official.

2. *Private,* when written by any private person. A private document may be:

A. *Semi-* or *Quasi-Official,* when it is recognized directly or indirectly by a public authority as true and genuine, such as a bank check, a receipt and the like.

B. *Strictly Private,* when it is not recognized by public authorities as official in any way, such as letters, diaries, and the like.

Both public and private documents may be in the original form or may be copies. A copy is considered:

A. *Certified,* when it is duly attested by some public personage as a true copy of an original. Such a person may be an ecclesiastical or civil notary, a clerk of court, or similar personage.

B. *Uncertified,* when not duly and officially attested.

A document may also be:

1. *Genuine,* when it actually belongs to or proceeds from, the reputed source, origin, or author and has the character it is claimed to have.

2. *Anonymous,* when it is nameless or of unknown or unavowed authorship.

3. *Spurious,* when it does not proceed from the true source, nor from the source pretended.

4. *Certain,* when there is no doubt about the authenticity or content.

5. *Doubtful,* when the authenticity or content is subject to question.

Authors are not in agreement as to the precise definition of an authentic document, as employed in Canon 1990. Some

Canonists [22] interpret the word authentic as referring to documents that furnish full public proof, or that merit complete public credence. Others, however, consider the term authentic as equivalent to *genuine* or *true* and thus would include private documents, provided they were proved to be genuine.[23] Since both opinions are advanced by renowned authorities, either opinion may be followed.

The certainty of the document must cover every aspect of the case. Thus the document must clearly and unquestionably designate the person or persons referred to. The greatest precaution should always be employed to ascertain the identity of the parties. If any doubt arises on this point, adequate provisions must be taken to resolve the doubt.

2°. Document Above Exception and Beyond Contradiction.

Canon 1990 demands that the certain and authentic document be beyond contradiction and exception. This necessitates a careful and conscientious scrutiny of each document presented to the Ordinary. Should there be a well-founded suspicion that the document is false or forged, this phase of the case should be thoroughly investigated. If a signature or seal is missing; if interpolations or erasures are discovered; if other defects are discernible, the document may not be accepted as constituting proof until all reasons for suspicion or contradiction are removed. If the handwriting of a party is questioned, or if other similar problems arise, the general norms of Canons 1800, 1818-1824 can be followed, *congrua congruis referendo.*

3°. Special Types of Documents.

a. Affidavits.

[22] Noval, *De Processibus*, I, n. 541, p. 366; Vermeersch-Creusen, *Epitome*, III, n. 296, p. 134; Cappello, *De Sacramentis*, III, n. 891; p. 944; Vlaming, *Praelectiones*, II, n. 803, p. 384.

[23] Ayrinhac-Lydon, *Marriage Legislation*, n. 326, p. 363; Blat, *De Processibus*, n. 551, p. 525; Triebs "De Interpretatione Canonum 1990-1992"—*Periodica*, XX (1931), 100*; Payen, *De Matrimonio*, III n. 2722, p. 533.

In English-speaking countries, affidavits are the usual form of sworn written statements. These are public civil documents and hence are to be viewed as such in ecclesiastical courts in accordance with the provisions of Canon 1813 § 2. In the scrutiny of such documents three points are always to be kept in mind. First, it is notorious that false and spurious affidavits are not infrequently presented to ecclesiastical courts. Second, untruthful statements are often incorporated in affidavits. Third, an affidavit is not sufficient in itself, to beget certitude.

From the foregoing, it is clear that the first duty of the Ordinary is to ascertain whether an affidavit is genuine, certain and authentic. The next step is to examine the inherent truth of the statements sworn to in the affidavit. It is precisely here that the greatest caution must be exercised. Nowadays a great number of people have lost sight of the sacred character of oaths and do not hesitate to swear to absolute falsehoods. Hence, when the Ordinary has good reason to doubt the veracity of an applicant, special investigations must be made before the statement in question can be declared above suspicion and contradiction.

The third point to be remembered is that affidavits, in themselves, are not sufficient to beget certitude. Affidavits merely certify to the fact that certain persons made certain solemn affirmations, confirmed by oath, before a duly qualified notary public at a specified time. Obviously, such affidavits do not constitute proof of the inherent truth of the statement. This fact must be further investigated by the Ordinary.[24]

It sometimes may happen that an Ordinary might infer that the declarations and affirmations embodied in affidavits constitute full proof in ecclesiastical courts. These affidavits are not judicial depositions as envisaged in Canons 1750 and 1791. However, they do give corroborative or adminicular force to proof. Furthermore, since they are public documents they constitute surety only about those things that are directly and principally affirmed, as is clear from Canon 1816:

[24] For more detailed information on this subject, cf. *Canonical Procedure*, I, pp. 276-287.

Documenta publica fidem faciunt de iis quae directe et principaliter in eisdem affirmantur.[25]

Needless to say, the facts directly and principally affirmed in affidavits are that certain parties appeared before a duly qualified notary public at a specified time and made certain solemn affirmations, confirmed by oath. It is to be noted that surety is not given thereby as to the inherent truth of the solemn affirmations. Canon 1816 does not guarantee that. The inherent truth of the solemn affirmations must be ascertained by further investigation.

b. Photostatic Copies.

Canon 1990 speaks of a certain and authentic document, but does not demand that the original of such a document be presented to the court. Article 159 of the Instruction, *Provida,* states that documents have not probative value in court and hence are not to be admitted unless they are originals or are submitted in the form of an authentic copy and are deposited with the chancery of the court.[26] In order that a copy be considered as authentic, it is required that it be written by hand, and be signed with the signature of those in charge of the archives containing the originals, or the ecclesiastical notary, and must bear a seal. In the case of public civil documents, a copy is considered authentic provided it is drawn up in the form which the civil laws require.

Neither the Code nor the Instruction, *Provida,* makes any mention of the permissibility of photostatic copies of documents. It would appear that photostatic copies could be accepted by the court, provided that these copies are made with all proper precautions under the formal surveillance of a delegated auditor or the local Ordinary, as mentioned in Canon 1821, § 2, and further, that the accuracy and authenticity of such copies are not subject to exception or contradiction.

[25] *S. R. Rotae Dec.,* XVIII (1926), 195, n. 7.

[26] Can. 1819.

B. OTHER LEGAL FORMS OF PROOF TO ESTABLISH THE ABSENCE OF A DISPENSATION

Title X of Book IV of the Code indicates very clearly that there are several forms of proof besides documents. Hence, it is not surprising that on June 16, 1931, the Pontifical Code Commission declared that the certitude demanded by Canon 1990 could be obtained from other legitimate sources in addition to documents. Thus the Commission was asked:

"Whether the *par certitudo* mentioned in Canon 1990 can be obtained only from a certain and authentic document, or also from some other legitimate source?" To which the Reply was: "In the *negative* to the first part; in the *affirmative* to the second." [27]

From this response, it would appear that this "*par certitudo*" deducible from other legitimate sources of proof would be applicable both to the primary fact of lack of dispensation and also to other matters considered in Canon 1990, such as the very existence of the impediment.

In practical cases of summary procedure the principal forms of legal proof, in addition to documents, would generally be witnesses as well as the special circumstances which precede, accompany and surround a particular case.

1. *Witnesses.*

In cases of disparity of worship, for instance, witnesses are particularly important as a means to establish the negative fact of baptism. Thus the testimony of witnesses can constitute a source of proof which in turn can beget certitude.

Witnesses are divided into different categories according to their status before the court and likewise according to the type of testimony they give. According to the first category they are classified as private, expert or authorized (i.e., *testes qualificati*) witnesses.[28] *Testes qualificati* or authorized wit-

[27] Pont. Comm., 16 Junii 1931—*AAS*, XXIII (1931), 353-354.

[28] For a detailed study of testimony and witnesses, cf. *Canonical Procedure*, I, pp. 178-252.

nesses are those who are duly appointed to some public office and who testify to matters which strictly belong to or are intimately associated with the particular office.[29] Thus Ordinaries, pastors, notaries, court messengers and the like are *testes qualificati* when they testify to what has been observed or done in their official capacity. For instance, a pastor testifies as a *testis qualificatus* or authorized witness in a deposition as to the form in which a marriage was celebrated, the external manifestation of consent by the parties and similar official acts. However, should he give testimony merely about the joyful or morose attitude of a bride or groom or about similar extraneous matters, his deposition would not be evaluated as that of a *testis qualificatus* for the simple reason that he was not testifying to matters which strictly belong to his office.[30]

It is to be particularly noted that the witnesses to a marriage or the sponsors at baptism are not *testes qualificati.* They are *testes privati.* Hence, the deposition of one such witness does not constitute full proof. The reason is that these witnesses are not appointed to any public office. They are simple [31] or private witnesses in whose presence the solemnization of the marriage contract or the baptism takes place.

2. *Circumstances.*

The circumstances which precede, accompany and follow certain marriages frequently aid in establishing the certainty required by Canon 1990. For instance, in a case involving the impediment of *ligamen,* it is highly advisable to demand that the license, particularly for the first marriage, be submitted for examination and scrutiny. Such a license, among other things, would give the age of the party at the time of the first marriage. The age stated at the particular time is a

[29] Thus a police officer is a *testis qualificatus* when he testifies to matters belonging to his office.—*S. R. Rotae Dec.,* XVII (1925), p. 332, n. 9.

[30] Can. 1791, § 1.

[31] Reiffenstuel, *Jus Canonicum,* II, 20, 271-276.

circumstance which frequently helps to establish the certainty of the fact that this was the first and original marriage. These and similar circumstances are helpful as means to establish the certainty required by Canon 1990. And thus they become legitimate sources in the attainment of certitude, as envisaged in the law.

V. The Local Ordinary and Other Members of the Tribunal in Summary Cases

A. THE LOCAL ORDINARY ACTING AS JUDGE

1. *Law of the Code and of the Instruction, Provida.*

Article 227 § 1 of the Instruction, *Provida,* supplements and explains the Code in using the term: *Ordinarius, judicem agens.* This, in our judgment, tends to corroborate the opinion that the process is judicial. It likewise clearly excludes the Vicar General from acting as judge in summary judicial cases. This restriction is deducible from the provisions of Article 3 § 2: *Ordinarii nomine, non veniunt in hac Instructione neque Vicarius Generalis quando agitur de ponendis actis iudicialibus* (cf. can. 1573 §-2), *neque Superiores religiosi.*

Furthermore, it emphasizes the point that in view of the truly extraordinary and exceptional character of the summary cases, the Bishop and not the *Officialis* is the ordinary judge in these matters. The ordinary judicial power of the *Officialis* is herein restricted and the usual power of judging is vested solely in the Bishop so as to repose the responsibility for these cases in the highest authority in the diocese.

2. *Personal Responsibility of the Ordinary as Judge.*

The terminology employed by the Instruction, *Provida,* in Article 227 § 1 emphasizes the fact that the mind of the Holy See is that the primary responsibility in deciding cases envisaged in Canon 1990 rests personally upon the Bishop. Should he be absent or impeded, he may empower the *Officialis, by a special mandate,* to issue sentences, but even in such cases the fundamental responsibility rests upon the Bishop. Obviously, the special mandate referred to in Article

228 may be granted for all summary cases, if the Bishop sees fit, provided he is absent from the diocese or impeded from acting.

A question arises here whether a Bishop of a large diocese who is preoccupied with innumerable other problems of an important nature may permanently and habitually delegate the *Officialis* to handle all summary cases. The mind of the Legislator seems to be that the Bishop is ordinarily expected to examine, study and adjudicate the cases personally. Obviously, he may call upon others for assistance, but the general direction of the cases should be personal in view of the personal responsibility of his office. Hence, it appears that it is not in accord with the mind of the Legislator to delegate all such cases to the *Officialis* permanently and habitually. There is no provision in law which permits or authorizes Bishops constantly and habitually merely to sign in a perfunctory manner the decisions which have been formulated by others.

In addition to the other reasons previously stated in favor of this opinion, the *Schema* of 1914 seems to provide further corroborative evidence. This *Schema* stated: *poterit TRIBUNAL matrimonii nullitatem declarare, cum interventu tamen Defensoris vinculi* (Can. 516, i.e., Can. 1990). As is well known, the word *TRIBUNAL* was deleted and the word *ORDINARIUS* was substituted, while the phrase, *citatis partibus,* was added in the Code.

3. *The Duties of the Ordinary in Summary Cases.*

a. Citation or Summons of the Parties.

One of the first duties of the Ordinary, acting as judge, is to summon both parties and to hear them: *citatis semper partibus iisque auditis* (Art. 227 § 1). This citation or summons of both parties must be made before the nullity of the marriage is declared, as the Pontifical Code Commission indicated on July 16, 1931.[32] In formal trials this citation is necessary for

[32] Pont. Comm. 16 Julii 1931—*AAS,* XXIII (1931), 354, n. IV: "Whether the *citatio partium* mentioned in Canon 1990 is to take place before the declaration of the nullity of the marriage." REPLY. "In the affirmative."

the validity of the process.[33] Judging from the text of Canon 1990 and from the wording of Article 227 § 1: *citatis semper partibus iisque auditis,* it appears that this citation is likewise necessary even in summary cases for the validity of the process. Consequently, the citation of both parties should never be knowingly neglected.[34]

Since Canon 1990 sanctions the omission of the solemnities of a formal trial (*praetermissis sollemnitatibus*), it can be safely stated that all the meticulous details enunciated in Canon Law need not be observed in summoning the parties. However, some form of notification which is truly adequate is necessary, as Canon 1715 clearly enacts.[35] Even if the form of the citation happened to be invalid, the sentence would be invalid only in virtue of remediable nullity, which could be rectified without great difficulty.[36]

Article 211 § 3 of the Instruction, *Provida,* states that the nullity of a sentence which is remediable is considered to be automatically rectified if neither a complaint of nullity has been filed nor the sentence corrected within the periods of time designated in Article 210. This Article in turn states: " The complaint of nullity in the cases mentioned in Article 209 may be proposed either together with the appeal, within ten days to the higher tribunal, or separately and solely as a complaint of nullity within three months from the day of the publication of the judicial sentence before the court which rendered the sentence (cf. Can. 1895)."

When the summons has been legally served the following take effect:

1. The case ceases to be a *res integra.*[37]

[33] Can. 1680; 1712; 1723.

[34] Can. 6; 18; 20; 39.

[35] *Canonical Procedure,* I, pp. 157-170.

[36] Can. 1894, 1 °; Art. 209; *Canonical Procedure,* I, 347-348.

[37] Can. 1725, 1 °.

2. The jurisdiction of the competent tribunal is securely established as soon as the legal action is duly begun.[38]

3. The lawsuit begins to pend.[39]

In summary cases the most important practical effect of the legally served summons is that the jurisdiction of the competent tribunal is permanently established to the exclusion of other tribunals. If the parties had been previously free to choose between two or more concomitantly competent courts before the official serving of the summons, they are now restricted to the jurisdiction of one tribunal, even though they may change their domicile or quasi-domicile while the case is being decided.[40]

b. Hearing of the Parties.

If the parties appear in court of their own initiative, as is intimated in Article 226: *auditis conjugibus, si comparuerint,* this appearance could be arranged to acquit at the same time the obligations connoted by the term *citatis semper partibus iisque auditis* of Article 227 § 1, provided the Ordinary or his delegate proposes the questions or secures the information required in the particular case, in the presence of the notary. This is deduced from the rulings of Canon 1711 § 2, which states that if the parties appear in court of their own accord, it is not necessary to issue the formal summons.[41]

In ordinary cases, after the *Officialis* is convinced that it is a case of certain and evident nullity he refers the matter to the Ordinary, as Article 226 enjoins. Thereupon, the provisions of Article 227 come into force and the subsequent phase of the summary trial begins. The Ordinary then summons the

[38] Can. 1725, 2 °.

[39] Can. 1725, 5 °; Art. 85.

[40] Can. 1725, 2 °.

[41] If one of the parties lives outside the diocese, the summons is issued as in formal cases (Can. 1717 § 2; 1719; *Canonical Procedure,* I, 163-169). The rogatory commission, the formulation and sending of the interrogatories, and other details are taken care of as in formal cases, *congrua congruis referendo.*

parties. When they appear in answer to this official citation or summons, the Ordinary should, as a rule, according to the provision of Article 227 § 1, hear and question the parties personally, in the presence of the *Defensor Vinculi,* and notary.[42] The *Promotor Iustitiae* is also to be cited if he has impugned the marriage or if he has been called into the case by the Ordinary.[43]

c. Study of Proofs by the Ordinary.

One of the most important duties of the Ordinary is to study and examine the proofs from documents and other legitimate sources. In this study he should bear in mind the rulings of Canon 1990 and Article 226 of the Instruction, *Provida.* In accordance with these enactments of Canon Law he must consider whether the existence of an impediment or cause of nullity is proved by a certain and authentic document, which is beyond all contradiction or challenge. If this is ascertained, and if with equal certitude or from some other legal form of proof (Canons 1747-1824) it is equally certain that a dispensation was not granted, the Ordinary is in a position to proceed further with the case.

d. Dealings with Contumacious Parties.

In the matter of contumacy, the rules are the same as in formal procedure.[44]

e. Study of the written opinions of the *Defensor Vinculi* and the *Promotor Iustitiae.*

1 ° Cognizance of the opinion of the *Defensor Vinculi* is always necessary.

The intervention of the *Defensor Vinculi* in summary cases has always been insisted on by the Holy See and is demanded by Canon 1990: *cum interventu tamen defensoris vinculi,* and Article 227 § 1: *voto etiam exquisito defensoris vinculi.* From the foregoing we conclude that the intervention of the *De-*

[42] Can. 1587; 1968.

[43] Art. 229, § 2.

[44] Can. 1714; 1718; 1842; 1849; 1850; Art. 86; 91; 115.

fensor Vinculi in the sense that he should submit his opinion to the Ordinary is necessary *ad validitatem processus.* We do not maintain that the Ordinary need follow or heed this opinion; but an opinion [45] must be submitted as an indication of the intervention of the *Defensor Vinculi* in the case.[46] And it may be further noted that according to the understanding and practice of the Roman Curia a *votum* is always a written opinion.

2 °. Cognizance of the opinion of the *Promotor Iustitiae* in certain cases.

It is noteworthy that the *Promotor Iustitiae* is not referred to in Canons 1990-1992. However, Article 227 § 1 states: *voto exquisito . . . promotoris justitiae, si iste matrimonium accusaverit vel ipsum Ordinarius audire censuerit.* From the foregoing it becomes definitely clear that the *Promotor Iustitiae* is to submit his opinion in the two following cases:

1. If he has impugned the marriage.
2. If the Ordinary wishes to consult him.

It appears that the *Promotor Justitiae* has both the right and the duty to submit his opinion when he attacks the marriage. He is not to become actively engaged in other cases unless the Ordinary expressly invites him to do so. This opinion appears deducible from Article 16 of the Instruction, *Provida,* which states: " The *Promotor Justitiae* must intervene when he himself impugns the validity of the marriage and whenever there is a question of safeguarding procedural law. In this latter case, the intervention of the *Promotor Justitiae* is determined by the Bishop or by the collegiate tribunal either *ex officio* or upon the instance of the *Promotor Justitiae* himself or of the *Defensor Vinculi* or of the consorts."

f. Pronouncement of the sentence.

It is true that summary cases are a sort of miniature of formal trials. Nevertheless, the contour and general principles

[45] Can. 1968, 3 °.

[46] Can. 105, 1 °; 1587; Payen, *De Matrim.,* III, n. 2723, p. 535.

of procedure are to be preserved insofar as justice demands. The validity of a sacrament is never to be exposed to jeopardy for the sake of unwise haste or misguided efficiency. The following are some of the points that the Ordinary must consider before he pronounces final sentence:

1. Ascertainment of the real facts of the case.

2. Irrefragable proof for the essential elements in the case.

3. Thorough investigation of the important phases of the case.

4. Proper study of the law applicable in a particular case.

5. Clear determination of the principles involved in the case.

6. Assurance that the important documents in the case are truly certain and authentic.

7. The presumption of law favoring the marriage (Can. 1014; Article 172).

8. Necessity of moral certitude (Canon 1869; Art. 197).

B. THE OFFICIALIS

1. *The Officialis as expert investigator in summary cases.*

a. Nature of office of *Officialis* in summary cases.

Article 226 of the Instruction, *Provida,* happily supplements the Code by determining the exact duties and prerogatives of the *Officialis* in summary cases. This Article makes it clear that the *Officialis* is the expert investigator or fact-finder; but that he is not the judge empowered to pronounce a definitive sentence. In this, his role is somewhat similar to that of the Auditor in formal trials, who has the right to hear witnesses and to draw up the judicial acts according to the tenor of the mandate of his appointment, but who has no authority to pronounce a definitive sentence (Can. 1582; Art. 24).

b. Duties of *Officialis* as expert investigator.

1 °. To ascertain facts of case.

The following are some of the tasks the *Officialis* must perform:

a °. To determine question of competency.

b °. To ascertain exact nature of the case and the precise impediment or impediments involved.

c °. To scrutinize the documents presented and to determine whether they are certain and authentic.

d °. To decide whether the documents are beyond all contradiction or challenge.

e °. To ascertain with full moral certitude from documentary proof or from some other legal form of proof that a dispensation from the existing impediment has never been granted.

f °. To determine whether the case is sufficiently proved to warrant its presentation to the Bishop for his definitive decision.

2 °. To interview the parties presenting themselves in court.

It is to be noted that the *Officialis* is not empowered to summon the parties, on his own authority, in summary trials. However, he may hear them and take their testimony if they appear of their own accord at the tribunal, or in reply to the summons of the Bishop.

To avoid difficulties and embarrassments it would be advisable for the Bishop to grant general delegation to his *Officialis* to summon all parties and persons concerned in summary trials. This simple expedient would obviate many inconveniences, and is thoroughly in accord with the spirit of the law.

3 °. To prepare the case for the Bishop.

After the *Officialis* has completed his work, as outlined above, he should submit to the Bishop the results of his investigation and study, together with all the documents in the case. If the Bishop wishes or permits, the *Officialis* may even include his own personal observations and recommendations.

Since the definitive sentence must be pronounced by the Bishop after he has made a personal study of the case, the conclusions of the *Officialis* should not encroach in any way upon the prerogatives of the Bishop.

2. *The Officialis as delegated judge.*

a. Delegation of the *Officialis* as judge in exceptional circumstances.

Article 228 enumerates the following reasons as sufficient to empower the Bishop to delegate the *Officialis* to pronounce sentence in summary cases:

1 °. The absence of the Bishop.

2 °. The inability of the Bishop to act.

The absence of the Bishop from his diocese or his episcopal city authorizes him to grant a special mandate to the *Officialis* to pronounce sentence in exceptional cases. This special mandate may delegate the *Officialis* for some particular case or cases, or for all the cases during a certain period of time.

If the Bishop is impeded from pronouncing sentence because of illness, exile from his diocese, or any other similar reason, he may likewise delegate the *Officialis* by special mandate to conduct summary cases and to pronounce sentence. Even if the Bishop delegates the *Officialis* without a sufficient reason, it appears that the delegation and the sentence are unquestionably valid (Can. 1680). However, if an *Officialis* were to undertake to adjudge cases and to issue sentences without any special mandate from the Ordinary (which is specifically required by Article 228 of the Instruction, *Provida*), such sentences would be invalid.

b. The *Officialis* acting as delegated judge.

The following are the rights of the *Officialis* when he acts as judge, delegated by the Bishop:

1 °. To summon the parties and persons concerned in the case.

Concomitantly with the power to pronounce definitive sentence goes the authority to summon the parties and persons necessary to reach a definite decision. Hence, the *Officialis* may summon all parties and persons concerned in the cases for which he has been delegated by the Bishop.

2 °. To pronounce definitive sentence.

As the duly delegated representative of the Bishop, the *Officialis* has the right to pronounce the definitive sentence in all the cases for which his mandate of appointment delegates him. The mandate of such delegation should always be in writing and should clearly specify the extent or limits of the delegation as to time or to number of cases. The *Officialis*, thus delegated, should never fail to make mention of the date and tenor of the mandate in every definitive sentence he issues.

The duties of the *Officialis* as delegated judge are similar, in most respects, to those of the Bishop acting as judge, as outlined above. The following brief enumeration indicates the most important duties:

1. To cite the parties and other persons necessary for the case.

2. To hear, under oath, the parties or persons duly summoned or appearing in court of their own accord.

3. To deal with contumacious parties according to the provisions of law.

4. To study the animadversions of the *Defensor Vinculi.*

5. To examine the opinion of the *Promotor Justitiae,* if he is engaged in the particular case.

6. To pronounce definitive sentence in the case according to the provisions of law.

7. To indicate the date and precise tenor of the mandate in virtue of which he pronounces sentence.

8. To remand cases to the collegiate tribunal for formal trial, whenever necessary.

C. THE PROMOTOR JUSTITIAE

1. *Importance of the Promotor Justitiae in summary cases.*

The Code made no specific mention of the *Promotor Justitiae* in summary cases. In accordance with the general tenor of the Instruction, *Provida,*[47] Article 227 § 1 enacts that the *Promotor Justitiae* must give his opinion in cases in which he impugned the marriage or if the Ordinary thinks that he should be consulted. This provision of law is but a corollary of Article 16 § 1 which states that "the *Promotor Justitiae* must intervene when he himself impugns the validity of the marriage, and whenever there is a question of safeguarding procedural law. In this latter case the intervention of the *Promotor Justitiae* is determined by the Bishop or by the collegiate tribunal either *ex officio* or upon the instance of the *Promotor Justitiae* himself or of the *Defensor Vinculi* or of the consorts."

2. *Duties of the Promotor Justitiae in summary cases.*

As can well be surmised, the duties of the *Promotor Justitiae* are not of such paramount importance in summary cases, that his absence would affect the validity of the proceedings. Even if he failed to submit his opinion in the cases envisaged in Article 227 § 1 of the Instruction, *Provida,* the validity of the proceedings would still be safeguarded. However, his duty is plainly to offer his written opinion in accordance with the enactment of Article 227 § 1. If he fails in this, he should be recalled to a sense of his obligations by the Ordinary.

D. THE DEFENSOR VINCULI

1. *Animadversions of the Defensor Vinculi.*

The *Defensor Vinculi* must submit his written animadversions in all summary cases, without exception. This is necessary, at least, for the licitness of the process. If a case were decided solely by the Ordinary or his delegate without any consultation of or notification to the *Defensor Vinculi,* such a

[47] Cf. Art. 16; 35 § 1, 1°; 38 § 2; 91 § 2; 211 § 1.

decision would appear even to be invalid. Therefore, it is our opinion that the intervention of the *Defensor Vinculi* is necessary in summary cases *ad validitatem processus*. This seems clear from Canons 1586, 1587, 1967, 1968.[48]

2. *The importance of the office of the Defensor Vinculi in summary cases.*

From the foregoing it is not to be concluded that all the formalities of a regular trial must be observed in summary cases. Since many formalities are to be omitted, the office of the *Defensor Vinculi* is simplified in a corresponding degree. As previously stated, he must be summoned or be present, just as in formal trials. Moreover, the acts of the process must be duly submitted to him for his study and animadversions. He has the right and serious obligation to scrutinize the documents presented in order to ascertain their authenticity and certainty. In some respects his responsibility in conscience is even greater than in formal trials as the decision of the case rests with one person: the Bishop or the *Officialis*, instead of with three judges. Hence, the need of greater surveillance on the part of the *Defensor Vinculi*.

3. *Right and obligation of the Defensor Vinculi to appeal to a higher tribunal.*

A final factor that indicates the great importance of the office of the *Defensor Vinculi* in summary cases is that Canon 1991 and Article 229 § 1 not only authorize, but even oblige him to appeal to the tribunal of second instance whenever he prudently thinks that the impediment is not certain, or that a dispensation therefrom may have been duly granted. All of this presupposes a very thorough knowledge and study of the case in hand.

E. THE OFFICE OF THE NOTARY IN INFORMAL PROCEDURE

The office, the rights and the duties of the notary are practically uniform in every form of procedure. Hence, in all sum-

[48] Payen, *De Matrim.*, III, n. 2723, p. 535.

mary processes, as well as in formal procedure, there must be a notary who is the recorder of all the acts. Acts which are not written by the notary or at least signed by him are null.[49] Wherefore, before a tribunal begins an informal case, the Ordinary or duly delegated *Officialis* should designate as recorder one of the notaries who has been legally appointed according to Canon 373, unless the Ordinary sees fit to designate a special notary for a particular case.[50]

The role of the notary always constitutes a distinct office, even in summary procedure. For this reason, his office is incompatible [51] with that of the *Promotor Justitiae* or of the *Defensor Vinculi.*[52]

In view of the nature of his office, a notary is a *testis qualificatus* whenever he acts in his official capacity in the fulfillment of his office.[53] There were instances in the legislation previous to the Code where two witnesses were considered equivalent to the notary. Since the Code, the substitution of two witnesses for the notary is no longer valid.[54]

All the documents properly drawn up by the notary in the fulfillment of his office are public ecclesiastical documents.[55] As such, they constitute surety for those matters which are directly and principally affirmed therein.[56] This point is of paramount importance and should be borne in mind in all informal proceedings. Frequently, tribunals receive documents of one type or another containing statements about

[49] Can. 1585 § 1.

[50] Can. 1585 § 2.

[51] S. C. Ep. et Reg., Apr. 1727—*Analecta Iuris Pont.*, XIII, 44.

[52] A truly singular exception to this rule of law is found in the *Regulae Servandae in Processibus super Matrimonio rato et non consummato,* Caput IV, Reg. 24 § 4—*AAS,* XV (1923), 397.

[53] Reiffenstuel, *Ius Canonicum,* II, 20, 271-276.

[54] Some authors see a slight vestige of the former legislation in Canon 1659 § 2.

[55] Can. 1585 § 1; 1813 § 1, 2 °, 3 °; Art. 156 § 1, 2 °.

[56] Can. 1816.

which doubts may be entertained. To clarify such dubious points, the required testimony could be taken in the presence of the ecclesiastical notary in the form of a judicial deposition.

VI. Procedure to be Observed in Summary Cases

A. Omission of solemn formalities

Canon 1990 employs the phrase: *praetermissis solemnitatibus hucusque recensitis* in order to indicate that the solemn formalities of formal trials may be waived in summary cases. As previously intimated, this phrase has been taken *verbatim* from the general Decree of the S. C. of the Holy Office of June 5, 1889.[57] And here it may not be amiss to remark that the solemnities that could be omitted in 1889 were two in number, namely:

1. The necessity of a second concordant sentence favoring the nullity of the marriage in question.
2. The requirement of appealing from the first sentence favoring the nullity.

Since the Code, no definite legislative norms have been promulgated by the Holy See indicating the precise formalities which may be omitted. Nevertheless, it appears, from the history and the very nature of summary trials that the essential elements of a judgment should be retained, such as the following:

1. The generic norms governing judicial competency (Canons 1556-1568), and the specific norms applicable to competency in matrimonial cases (Canons 1960-1965).
2. The right of the parties to accuse the marriage.
3. The accusation itself of the complaint of nullity.
4. The right to a defense of the bond.
5. A sentence.

Commentators have not determined with uniformity or precision the exact formalities to be observed in each sum-

[57] *Fontes*, IV, n. 1118.

mary case. Certain essential elements are necessary for every trial, whether it be summary or formal. A summary trial is usually stripped of all non-essential elements and essential factors are reduced to an absolute minimum. Enough of the judicial structure is retained to permit the lineaments of a formal trial to stand out in bold relief; but formalities likely to impede or delay the expeditious settlement of cases are waived. Naturally, certain summary cases require more detailed formalities than others. The nature of the case and the particular problems involved will ordinarily guide the Bishop and the *Officialis* as to the procedural safeguards to be observed.

B. COMPETENCY

Since, in our opinion, summary cases are judicial in character, the norms for determining competency will be substantially the same as in formal trials. Competency in these matrimonial cases may thus be defined as that definite jurisdiction by which an Ordinary is empowered to judge a specific case of certain individuals in a determined territory. Hence, the nature of the case, the persons involved, and the territorial extent of the jurisdiction must be taken into consideration.

The first criterion upon which competency is based in these summary and exceptional cases is that of territorial limits. Hence, competency is enjoyed, first of all, by the diocese [58] in which the marriage took place or in which the respondent (*pars conventa*) maintains a domicile or quasi-domicile.[59] If one of the consorts is a non-Catholic, the competent tribunal would be that of the domicile or quasi-domicile of the Catholic party, whether the Catholic consort be the petitioner or the respondent. If both consorts would happen to be non-Catholics, the ordinary rules on competency would obtain.[60]

[58] Can. 1559, 1608, 1609.

[59] Can. 92-95; 1964; Art. 4, 227-228.

[60] For a detailed study of the problems of competency and the question of domicile and quasi-domicile, cf. *Canonical Procedure,* I, 12-27.

Even if a wife has been maliciously deserted by her husband, she must cite him either before the Ordinary of the place where the marriage was celebrated or before the Ordinary of the domicile or quasi-domicile of the man himself. A wife, legitimately separated from her husband, either perpetually or for an indefinite time, does not follow the domicile of the husband and hence should be cited either before the Ordinary of the place where the marriage was celebrated or before the Ordinary of her own domicile or quasi-domicile. By the term "legitimate separation" is understood one that is granted by a decree of the Ordinary by a judicial sentence of a competent ecclesiastical tribunal, or even of a civil tribunal where such judgment is recognized in virtue of a concordat of the Holy See. A Catholic wife, even though not legitimately separated from her husband, can cite her own non-Catholic husband either before the Ordinary of her own proper and distinct quasi-domicile, or before the Ordinary of the domicile of her husband.[61]

A wife, not legitimately separated from her husband, who has her own quasi-domicile, can be cited even before the Ordinary of the domicile of her husband, but not of the quasi-domicile of the husband, except in the case where he has no domicile. While the case is pending, a change of domicile or quasi-domicile of the consorts in no wise destroys or suspends the competency of a tribunal, when this competency has been once duly established by a legal summons (Can. 1725, 2°, 5°; Art. 7-8); or by the spontaneous appearance of the parties in court, on their own initiative, as envisaged in Canon 1725, "*aut partes sponte in iudicium venerint*" and Article 226, "*si comparuerint.*"[62]

[61] Can. 93, 1964; Art. 6. Ciprotti, "Quaestiones de competentia ratione contractus et domicilii in causis matrimonialibus"—*Apollinaris* XI (1938), 461; Dalpiaz, "De competentia tribunalium ecclesiasticorum ratione domicilii legalis in causis matrimonialibus"—*Apollinaris,* IX (1936), 664.

[62] Questions relating to the exception of competency, disputed competency, precedence in cases of concomitant competency and the like, are treated in *Canonical Procedure* I, 27-30.

C. COMPETENT PETITIONERS

1. *The Promotor Justitiae.*

It is evident from the nature of the office of the *Promotor Justitiae* that he may introduce cases in summary process. This point has become indubitably certain since the promulgation of the Instruction, *Provida,* which specifically states in Article 227 § 1: "*. . . voto etiam exquisito promotoris justitiae, si iste matrimonium accusaverit.*"

In dealing with summary cases it is always to be remembered that all the impediments enumerated in Canon 1990 are, by their nature, public. Since the duty of the *Promotor Justitiae* is to protect and safeguard the public good, he may impugn the validity of any marriage envisaged in Canon 1990, even without a previous denunciation (Art. 39).[63]

2. *Catholic Plaintiffs or Petitioners.*

Catholic consorts are permitted to impugn the validity of their marriage in accordance with the rulings of Canon 1971 § 1, 1 °. One or both parties may introduce the case.

3. *Non-Catholics as Plaintiffs or Petitioners.*

As is well known, the practice of the S. R. Rota up until 1928 was to adjudge the cases of non-Catholics and this right was brilliantly vindicated in the Allocution of the Dean of the S. R. Rota before the Holy Father on October 1, 1927.[64] Despite the cogent arguments of the Dean (Cardinal Massimo Massimi), the celebrated reply of the S. C. of the Holy Office of January 27, 1928, peremptorily stated that non-Catholics could not act as plaintiffs in matrimonial cases without special recourse to the same Congregation.[65]

[63] For a discussion of the question of the impediments which are *natura sua publica,* cf. *Canonical Procedure,* I, pp. 77-80; Glynn, *The Promoter of Justice* (Washington, 1936), pp. 152-168.

[64] *AAS,* XIX (1927), 354.

[65] *AAS,* XX (1928), 75: "Utrum in causis matrimonialibus acatholicus, sive baptizatus sive non-baptizatus actoris partes agere possit. Ad I. Negative, seu standum Codici I. C., praesertim can. 87. Siquidem autem speciales oc-

Gasparri [66] and others maintained that this prohibition extends only to formal trials and not to summary cases. Furthermore, the private response of the S. C. of the Holy Office of April 20, 1931, to the Bishop of Harrisburg [67] has been almost universally interpreted as sustaining this opinion. However, if we are to follow the inexorable rules of logic, the conclusion would be forced upon us, it appears, that even in summary cases non-Catholic petitioners require the special permission of the S. C. of the Holy Office. First, the response of the S. C. of the Holy Office of January 27, 1928, is a general law, making no distinctions, despite the fact that the words *actoris partes agere possit* might seem to provide a strategic loophole. Secondly, the different replies of the S. C. of the Holy Office to the Bishop of Harrisburg and other Ordinaries are all private responses. And from the axiom of law it is well known that a general conclusion cannot be deduced from a private rescript. Even though the opinion may seem extremely rigorous, it appears that the ruling of the S. C. of the Holy Office of January 27, 1928 applies likewise to summary cases.

4. *Petitioners who are the Culpable Causes of the Impediment or of the Nullity.*

In our opinion, the same rules would apply in these cases, *congrua congruis referendo,* as in formal trials.

5. *Apostates as Petitioners.*

It appears that the same restrictions apply in summary cases as in formal trials.[68] Hence, apostates seem to be estopped from acting as petitioners even in summary cases.

currant rationes ad admittendos acatholicos ut actores in huiusmodi causis, recurrendum ad Supremam Sacram Congregationem Sancti Officii in singulis casibus." Cf. *Canonical Procedure,* I, p. 83.

[66] *De Matrimonio,* II, n. 1260, p. 293.

[67] Bouscaren, *Canon Law Digest,* II, 267-268.

[68] S. C. S. Officii, Decr. 15 Januarii 1940—*AAS,* XXXII (1940), 52.

D. THE LIBELLUS

As previously stated, some definite form of accusation, whether oral or written, is required for a judgment. Canons 1706-1710 and Articles 55-60 of the Instruction, *Provida,* enumerate the detailed requirements of a *Libellus* in formal trials. In summary cases, these meticulous details need not be observed in all exactitude, but the strictly essential formalities are required, such as:

1. The name of the tribunal.
2. The object of the petition, as usually expressed in the designation of the impediment or impediments involved.
3. Indication of proof, at least in a general form.
4. Signature of petitioner and the date.

E. THE CITATION OF THE PARTIES

Article 227 § 1 of the Instruction, *Provida,* states: *Ordinarius, judicem agens, citatis semper partibus iisque auditis.* From this it is certain that the parties must always be duly summoned, even in summary cases. Here again, it is not required to observe all the meticulous details described in Canons 1711-1725. However, the provisions of Canon 1715 must be duly observed, namely, " the summons should be served in proper form, which should express an order from the judge to the summoned party to appear; that is, it should state from which judge the summons emanates; the nature of the case indicated at least in general terms; and the designation of the defendant, by name and surname, who is being brought into court by the plaintiff. It should also clearly indicate the place and the time, that is, the month, day, and hour designated for his appearance. The summons, bearing the seal of the tribunal, must be signed by the presiding judge or by his auditor and the notary."

F. CONTUMACY

1. *Declaration of Contumacy.*

a. Contumacy of the Defendant.

It frequently happens that a party summoned in a matrimonial case is either unable or unwilling to appear before the tribunal. This is particularly true in cases of non-Catholics. If the defendant, after having been duly summoned, does not appear in court but offers some excuse for non-appearance, the Ordinary shall decide, after consultation with the *Defensor Vinculi,* whether the excuse is to be admitted or rejected. If the Ordinary does not accept the excuse offered, he is to designate a peremptory period of time within which the party must appear in answer to the summons (Art. 89).

If the defendant made no reply to the first summons or failed to reply within the designated time to the aforementioned peremptory notification, and still fails to appear in court, the Ordinary may declare him contumacious and proceed with the case, as previously indicated.[69]

b. Contumacy of the Plaintiff or Petitioner.

It may happen at times that even a plaintiff may lose interest in his case after he has impugned the validity of his marriage. This frequently occurs in cases where the petitioner, in defiance of the laws of the Church, enters upon a second, merely civil, marriage. If he fails to appear in court in answer to the lawful summons, either personally or through his legally appointed attorney, he is to be summoned a second time, under the threat of contumacy and upon the instance of the defendant. If he fails a second time to appear, the case shall be declared, by the Ordinary, as abandoned; unless either the defendant demands a declaration of nullity or the *Promotor Justitiae* undertakes to prosecute the case, in view of the public good.

[69] *Canonical Procedure,* I, 173-177.

2. *Exoneration from Contumacy.*

A person may be exculpated from the charge of contumacy at any stage of the summary trial, even up to the time of the pronouncement of the sentence (Can. 1871-1874; Art. 90). Ordinarily, a person is persuaded to recede from his position of contempt of court because of the kindly offices of some influential friend who prevails upon the contumacious party to appear before the tribunal (Art. 115).

It is particularly important in summary cases that every possible effort be made to induce the consorts to appear, especially the defendant. The good offices of the pastor, of friendly and influential persons, of business associates and every other available means should be employed to induce the consorts to appear before the Ordinary or his delegate. It can readily be discerned why the appearance of the consorts is so helpful in these types of cases. Under ordinary circumstances, the parties themselves are the best qualified to give accurate information about the absence of a dispensation.

VII. Special Problems Arising in Summary Cases

A. The Remandment of Cases to the Collegiate Tribunal for Formal Trial

Article 227 § 2 of the Instruction, *Provida,* enjoins that if the Ordinary should decide that all the requirements demanded by Canon 1990 are not concurrently verified so as to enable him to adjudge the case as an exceptional one, he is to remand the case to the collegiate tribunal, which shall then proceed according to the norms of formal procedure. In view of the express law of the Church, the Bishop or his delegate should not be hesitant to remand cases to the collegiate tribunal for formal trial. The modern tendency in some courts seems to be to force as many cases as possible into summary and exceptional procedure. This is decidedly not the mind of the Holy See in these matters. Cases tried under the provisions of Canon 1990 in a summary manner are truly excep-

tional and should be regarded as such. In view of the clear and unequivocal enactments of the Code and the Instruction, *Provida,* great care must always be taken to observe the rulings of Canon 1990-1992 and Articles 226-230 with meticulous exactitude, lest the clear intent of the law be nullified or frustrated.[70]

Since certain cases must be remanded to the collegiate tribunal for formal trial, it is important to know how this is to be done. By decree, the Ordinary remands to the collegiate tribunal every case which requires formal trial, in accordance with the prescriptions of Canon Law. This he may do at any stage of the process. In the decree he briefly states the reasons for his action. Similarly, the *Defensor Vinculi* and even the parties may request, at any stage of the process, that the case be remanded to the collegiate tribunal for formal trial. The Ordinary will examine such a request and will accede to it or reject it according to his own judgment and the rulings of Canon Law. If the request comes from the parties, the Ordinary would usually consult the *Defensor Vinculi* before issuing his decree of acceptance or rejection. In this decree the Ordinary likewise briefly states his reasons for accepting or rejecting the petition.

1. *The Remandment of Cases Introduced by Catholics.*

During the course of a summary trial it may be discovered that the nullity of the marriage is not evident, but that other sources of proof could be examined and supplied in a formal trial before the collegiate tribunal. The parties are then to be apprised of this fact and informed that they may present a formal *libellus,* according to the requirements of Canons 1706-

[70] "III. Whether such causes of nullity of marriage should be adjudicated according to the norms of Canons 1990-1992 or before the collegiate tribunal in accordance with the ordinary procedure of law. Reply: In the *Negative* to the first part; in the *Affirmative* to the second part, unless it is certain, in a particular case, that the requirements stipulated in Canon 1990 are duly verified."—*AAS,* XXXIII (1941), 294, 295; *AER,* CV (1941), 275.

1708 and Articles 55-60 of the Instruction, *Provida. This notification should be made by a decree of the Ordinary.* If the parties are Catholics and are not estopped on any other legal grounds from impugning the validity of their marriage, the case will follow the ordinary stages of a formal trial.

2. *The Remandment of Cases Introduced by Non-Catholics or Apostates.*

As previously stated, it is our opinion that in a summary process of a judicial nature, the special permission of the S. C. of the Holy Office is necessary. Presupposing that this permission has been duly obtained, the remandment of such a case to formal trial presents no additional difficulties. The procedure outlined in the preceding paragraphs is to be followed.

3. *The Remandment of Cases Introduced by Persons who are the Culpable Causes of the Impediments or of the Nullity.*

Presupposing that the provisions of the Reply of the Pontifical Code Commission of July 27, 1942,[71] had been duly observed, the remandment of such a case would follow the procedure just outlined.

4. *Remandment of Cases Introduced by Persons who have Guilty Knowledge of the Impediment or of the Nullity.*

The proper method for settling this problem is easily deducible from the foregoing.

5. *Remandment of Cases when Parties have Changed Domicile.*

When summary cases are handled in a judicial manner, the change of domicile does not create any particular problem. The effect of change of domicile in certain cases settled in administrative manner, shall be considered later.

[71] *AAS*, XXXIV (1942), 241. Cf. The Jurist, II (1943), 405-415.

B. THE METHOD OF CHANGING FORMAL CASES TO INFORMAL CASES

1. *Certitude about Existence of Impediment and about Non-Existence of Dispensation or Sanatio in Radice.*

A perplexing case that sometimes baffles members of a collegiate tribunal is how to handle a case which has been introduced with a formal *libellus* in formal trial but which can unquestionably and indubitably be declared invalid under the provisions of Canon 1990. In such cases the first points to be ascertained are the following:

a. That proof from certain and authentic documents or from some other legitimate source is unquestionably sufficient to prove with certitude that one of the impediments mentioned in Canon 1990 really exists.[72]

b. That it can be established with equal certitude that no dispensation had been granted.

c. That it can be established with equal certitude that no *sanatio* had been granted.

2. *Procedure to be Followed.*

The proper procedure to be followed is indicated in Canons 1732, 1736, 1740, and 1741, which state, in brief, that an instance can be terminated by abatement or by renunciation.[73]

[72] Pont. Comm., 16 Iunii 1931—*AAS*, XXIII (1931), 353.

[73] Canon 1732. The instance begins with the joining of the issues. It ends in any of the ways in which a trial may be ended, but it can also be interrupted before, and may be even terminated by abatement (Canon 1736) or by renunciation. Canon 1736. Prescinding from cases where some obstacle has impeded proceedings, if no procedural act has been done in the court of first instance for two years or in the court of appeal for one year, the lawsuit abates. In the latter case, the sentences contested in the court of appeals becomes a *res iudicata* (Canons 1902-1903). Canon 1740. § 1. The plaintiff may renounce the instance at any stage and in any degree of the trial. Likewise, both the plaintiff and the defendant may renounce either all or only some of the acts of procedure. § 2. For the validity of the renunciation it is necessary that it be made in writing, that it be signed by the party or by his proxy empowered thereto by special mandate, that it be made known to the other party and be accepted by him, or at least not attacked by him, and that it be

VIII. The Sentence

The accepted form of sentences in formal trials is found in the published volumes of the Sacred Roman Rota. There is no detailed form prescribed in law for sentences in summary cases; but these should be a sort of miniature of formal sentences.[74] Article 227 § 1 of the Instruction, *Provida,* stipulates that the sentence of nullity should briefly indicate the reasons both in law and in fact that motivate the decision.

Canon 1874 and Article 202 of the Instruction, *Provida,* enumerate the multitudinous details that are to be included in a sentence in a formal trial. Obviously, these are not necessary for the abridged sentence in summary cases; but they should be considered as models to be followed. The abridgment of the sentence does not authorize the neglect of any of the essential elements.

A. Preliminary Requisites

Certain preliminary requisites must be taken care of before the Bishop or his duly-appointed delegate may proceed to pronounce sentence in a summary case. The following are the most important:

1. The parties must have been summoned and heard.[75]

2. The opinion of the *Defensor Vinculi* must always have been obtained.[76]

3. The opinion of the *Promotor Justitiae* must have been received, if he has introduced the case or if his intervention had been considered necessary by the Ordinary.[77]

admitted by the judge. Canon 1741. Once the renunciation has been admitted by the judge, it has, in so far as the acts which one has renounced are concerned, the same effect as the discharge or abatement of proceedings. The renouncing party is obliged to pay the costs of the acts which he renounces.

[74] *Canonical Procedure,* I, 331-333.

[75] Can. 1990; Art. 227 § 1.

[76] Can. 1990; Art. 227 § 1.

[77] Art. 227 § 1.

4. Final certainty of competency in the case should be corroborated.[78]

B. MORAL CERTITUDE REQUISITE FOR SENTENCE

Before pronouncing any sentence, the judge must always have moral certitude about the matter to be defined by the sentence (Canon 1869). Hence, before the Bishop can pronounce sentence in summary cases, he must have moral certitude about the following:

1. Sufficient proof of the existence of an impediment or the cause of nullity of a marriage, as enunciated in Canon 1990 and Article 226 of the Instruction, *Provida*.
2. Existence of a certain and authentic document which is beyond all contradiction or challenge (Can. 1990; Art. 226).
3. Sufficient proof that a dispensation had never been granted (Can. 1990; Art. 226).
4. Sufficient proof that a sanation had never been granted.

C. THE LEGAL FORM AND CONTENTS OF THE SENTENCE

In summary trials it must always be borne in mind that a real and genuine sentence is being issued. Hence, the essential requisites of such a sentence should be present, for the very nature of a sentence requires certain definite elements which cannot be omitted even in summary cases. Canons 1873 and 1874 determine the constitutive elements of definitive sentences, as Canon 1875 in turn clearly emphasizes. The sentence issued in summary cases is a definitive sentence. Hence, the essential elements must always be present.

A sentence in a summary case should contain the following:

1. The invocation of the Divine Name.
2. The names of the Diocese, the Ordinary or his delegate, the plaintiff and the defendant (with proper designation of domiciles), the *Defensor Vinculi* and the *Promotor Justitiae,* if he takes part in the case.
3. *Species Facti:* a succinct statement of the important facts of the case.

[78] Can. 1964; Art. 3-12.

4. *In Iure:* a clear enunciation of the law. In most summary cases, the mere citing of the relevant Canons would ordinarily suffice.
5. *In Facto:* a brief, clear and adequate application of the law to the facts in the particular case, with replies to any cogent arguments that the *Defensor Vinculi* may have given.
6. *Conclusion:* a brief summing up of the case.
7. Dispositive part of the sentence, with the allotment of the fees and the decree of execution.[79]

D. FORMAL PUBLICATION OF THE SENTENCE

As indicated in Canon 1877, for formal trials, the publication of the sentence in summary cases may take place in three ways:

1. By summoning the parties to hear the solemn reading of the sentence by the judge sitting in the place of the tribunal
2. By notifying the parties that the sentence is available at the chancery of the tribunal and that they are authorized to read it and to request a copy thereof.
3. By sending, wherever the custom prevails, a copy of the sentence to the parties by registered mail, in accordance with the rulings of Canon 1719.

If special circumstances should warrant, it appears permissible to inform the interested party or parties of the nature of the sentence before the formal publication of the sentence takes place. This could be done by he notary in charge of the register of cases in a manner similar to that outlined in Article 199 of the Instruction, *Provida.*

Ordinarily, good Catholics do not begin any divorce proceedings in the civil courts until they have some assurance that their marriage is really invalid in the eyes of the Church.

[79] A detailed explanation of the different parts of a sentence is given in *Practical Manual for Marriage Cases,* pp. 207-209.

Consequently, they not infrequently introduce their cases in the ecclesiastical tribunals before the State has granted a decree of legal divorce or annulment. Ecclesiastical tribunals should never publish a sentence declaring a marriage invalid until the State has duly granted a decree of legal divorce or annulment. Otherwise, many difficulties and embarrassments may ensue.

E. DISCOVERY OF CASE OF RATIFIED AND NONCONSUMMATED MARRIAGE

It may happen, at times, that a very probable doubt, about the nonconsummation of a marriage, arises during the course of a summary trial, even though the nullity of the marriage cannot be satisfactorily proved. In such a case, either one or both of the parties have the right to present a petition to the Roman Pontiff for a dispensation from a ratified and nonconsummated marriage. The Ordinary would then have the correlative right, without any special permission, to draw up the process according to the norms established in the Decree of the S. Congregation of the Sacraments of May 7, 1923.[80] When this is completed all the acts of the case together with the opinion of the Bishop and the animadversions of the *Defensor Vinculi,* should be forwarded to the S. Congregation of the Sacraments (Art. 206 § 2).

F. THE QUESTION OF A NEGATIVE SENTENCE IN SUMMARY CASES

Article 227 § 2 of the Instruction, *Provida,* states that if the Ordinary decides that all the requirements of Canon 1990 do not concurrently exist in such a way as to authorize him to treat the matter as an exceptional case, he is to remand the entire case to the collegiate tribunal, which shall then proceed according to the ordinary norms of formal procedure, if the case warrants this type of procedure.

After studying a particular case, the Ordinary either decides that the proof adduced by certain and authentic documents is so incontestable that it appears evident that the marriage in

[80] S. Congr. de Sacr., 7 Maii 1923—*AAS,* XV (1923), 389.

question is invalid or he remands the case to the collegiate tribunal for formal trial. This remandment of the case may be made either by a formal decree or by the mere act of returning the petition and the documents to the collegiate tribunal, with instructions to proceed with the case according to the ordinary norms of formal procedure. Nevertheless, from time to time a singularly rare case may occur wherein incontrovertible evidence arises during the course of a summary trial proving the survival, for instance, of an allegedly deceased consort in a *ligamen* case, or the granting of a dispensation, a *sanatio* and the like in other cases. In such circumstances the proper way to dispose of a case would usually be by means of a negative sentence. Ordinarily, however, there is little need of a negative sentence in summary cases.

The fact that an Ordinary has once reviewed a case, does not necessarily preclude the possibility of his examining it a second time in summary procedure, provided it has not been formally introduced in the meantime for formal trial before the collegiate tribunal and provided further that additional documents or other legitimate sources of proof have been discovered. The prohibition of Canon 1571 would in no wise prevent this.

IX. The Appeal

A. THE APPEAL OF THE DEFENSOR VINCULI

1. *The appeal of the Defensor Vinculi to the Tribunal of Second Instance.*

In formal trials the *Defensor Vinculi* is always under a grave obligation to lodge an appeal against all affirmative sentences in first instance favoring the nullity of a marriage (Can. 1986; Art. 212 § 2). Canon 1991 and Article 229 § 1 indicate that in summary cases he is obliged to appeal to the Ordinary of second instance if he prudently thinks that the impediment is not certain, or that a dispensation therefrom may have been duly granted. He would likewise have a serious obligation to appeal if the Ordinary undertook to decide cases involving the

impediment of age or of any other impediment not included in the list that is *taxative* enumerated in Canon 1990.

In the event of an appeal, the complete records of the case are to be sent to the tribunal of second instance for examination. Special mention is naturally to be made in the appeal of the fact that the case has been settled in summary manner, according to the provisions of Canon 1990.

The Ordinary of second instance is to decide in the same manner as provided for in Canon 1992 and Article 227, whether the sentence is to be confirmed or whether the usual formal method of procedure is to be observed (Art. 230). And here it is of interest to note that Canon 1991, in referring to the appeal of the *Defensor Vinculi,* uses the phrase: *provocare tenetur ad Iudicem secundae instantiae,* instead of the term *ad Ordinarium;* and Canon 1992 speaks of *Iudex alterius instantiae.* Similarly, Article 229 § 1 employs the words: *provocare tenetur ad Tribunal secundae instantiae;* and Article 230 speaks of the *Tribunal secundae instantiae,* instead of using the term, *Ordinarius.*

The task of the tribunal of second instance is to determine whether sentence of the Ordinary of the first diocese is to be confirmed, or whether the case is to be remanded to the collegiate tribunal of first instance for formal trial.[81] If the case is remanded to the collegiate tribunal of first instance for formal trial, there is no particular problem involved. Should this collegiate tribunal pronounce sentence in favor of the nullity of the marriage, the *Defensor Vinculi* would then be obliged to appeal the case, as prescribed by Canon 1986. Thus the marriage bond would be duly safeguarded.

Neither the Code nor the Instruction, *Provida,* indicates the period of time within which the appeal is to be lodged with the tribunal of second instance. The norm enunciated in Canon 1881, which stipulates ten days, seems to be the only safe one to follow. Cappello thinks otherwise. However, in practice, who is impowered to determine any other period of

[81] Cappello, *De Matrimonio,* III, Pars. II, n. 892, p. 453.

time, if we do not accept the general principles of Canon Law? The absurd incongruities that would otherwise occur are evident to all.[82]

Not infrequently the question arises whether or not the parties are to be summoned to appear before the tribunal of second instance. Since Canon 1992 clearly states that the judge of second instance should proceed in the same way as in first instance, it appears that the consorts should at least be summoned.[83]

2. *The Appeal of the Defensor Vinculi to the Holy See.*

What is to be done if the Ordinary of the tribunal of second instance confirms the sentence of the court of first instance favoring the nullity of the marriage, against the asseverated protest of the *Defensor Vinculi* of the tribunal of either the first or second instance? Neither the Code nor the Instruction, *Provida,* envisages such a case. It appears, however, that the *Defensor Vinculi* then enjoys the right to lodge an appeal with the Holy See, i.e., either the S. R. Rota or the S. C. of the Holy Office.

B. APPEAL OF THE PROMOTOR JUSTITIAE

The Code made no mention of the right of appeal of the *Promotor Justitiae* in summary cases. Article 229 § 2 states that he enjoys the same right of appeal as the *Defensor Vinculi* in those cases in which he has been engaged. Hence, he may appeal to the tribunal of second instance as well as to the Holy See.

C. APPEAL OF THE CONSORTS

If a consort (usually the defendant) feels himself aggrieved by the sentence pronounced by the Bishop or the *Officialis,* he has the right to lodge an appeal with the tribunal of second instance (Art. 229 § 2). The Code made no specific mention

[82] Can. 1610 § 3; 1688; 1709 § 3; 1895. Cappello, *De Matrimonio,* III, Pars. II, n. 892, p. 451.

[83] Cappello, *De Matrimonio,* III, Pars. II, n. 892, p. 453, thinks otherwise.

of this right. Happily, Article 229 § 2 of the Instruction, *Provida,* supplies this lacuna.

In lodging this appeal, the consort may be actuated, for instance, by the conviction that the documents presented to the tribunal by the petitioner were neither certain nor authentic. The party should enumerate the reasons for lodging the appeal, so that the tribunal of second instance will be enabled to investigate the specific points of disagreement.

At times, it may happen that the parties may feel aggrieved when a summary case is remanded to the collegiate tribunal for formal trial. Juridically, however, they have no real cause for grievance. Consequently there is no legal remedy at their disposal, as the formal trial is really the ordinary and usual mode of procedure.

X. The Remandment of Appealed Cases to the Collegiate Tribunal for Formal Trial

A. Proper Canonical Organization of Collegiate Tribunal

It is taken for granted that the collegiate tribunal to which the case has been remanded by the court of second instance is properly and canonically organized for formal trials. If not, the Bishop should straightway appoint a sufficient number of persons necessary to conduct a formal trial.[84]

B. An Exception Against the Officialis

If the *Officialis,* in accordance with the rulings of Article 228, pronounced sentence in a summary case in favor of the nullity of a marriage and if the sentence, after being protested by the *Defensor Vinculi* has been appealed to the tribunal of second instance and later remanded to the tribunal of first instance for trial, it would be advisable to have one of the *Vice-Officiales* preside over the collegiate tribunal in this particular case. The reason is evident. The *Officialis* has given one decision in summary trial favoring the nullity. In all likelihood,

[84] For detailed information as to the canonical organization of a tribunal, cf. *Canonical Procedure,* I, pp. 33 ss., and *Practical Manual,* pp. 124 ss.

he would be inclined to give a similar decision in formal trial. If the Bishop has not taken steps to avert this difficulty by appointing a *Vice-Officialis* to preside over the collegiate tribunal, the *Defensor Vinculi* has the right, and it would appear, even the duty, to take exception to the *Officialis* as presiding judge of the tribunal (Can. 1614-1616; Art. 31-33).[85]

C. THE ASCERTAINMENT OF COMPETENCY IN APPEALED CASES

1. *Exception of Competency in Appealed Cases.*

If an exception is proposed against the competency of the tribunal to which a particular case has been remanded, in accordance with the provisions of Canon 1992, the question should be adjudged by the tribunal as indicated in Canons 1610; 1628; Art. 9; 27; 29.[86]

2. *Disputed Competency in Appealed Cases.*

If a controversy about competency arises between two or more tribunals, the provisions of Canon 1612 are to be observed.[87] This Canon states that " if a controversy arises between two or more judges as to which one is competent for a certain matter, the question is to be decided by the tribunal immediately higher. However, if the judges between whom the controversy over competency exists are subject to different higher tribunals, the settlement of the controversy is reserved to the immediately higher tribunal of that judge before whom the action was first instituted. If these judges have no higher tribunal, the conflict is to be settled by the Legate of the Holy See, if there is one, or by the *Signatura Apostolica.*"

3. *Precedence in Appealed Cases of Concomitant Competency.*

When the same case may be proposed before two or more equally competent tribunals, the right to adjudge the case be-

[85] *Canonical Procedure,* I, pp. 66-73.

[86] *Canonical Procedure,* I, pp. 64-73.

[87] *Canonical Procedure,* I, pp. 28-30.

longs to that tribunal which first legally summoned the party by means of a formal citation (Can. 1568; Art. 11).

XI. Formalities to be Observed after Declaration of Nullity of Marriage

A. Notification of Ordinary of Consorts

If the *Defensor Vinculi* lodges no appeal within ten days after the Ordinary has pronounced the sentence of nullity of a marriage according to the rulings of Canon 1990, the parties are free to marry. Consequently, the Bishop or *Officialis* pronouncing the judicial sentence is obliged, upon the expiration of ten days after the pronouncement of the sentence, to notify the Ordinary of the place where the marriage was celebrated (Can. 1987-1988; Art. 224).

Should the *Defensor Vinculi* signify (preferably in writing) that he has no intention of appealing against the sentence of nullity, the parties are permitted to marry even before the expiration of the ten-day period.

B. Annotation of Nullity in Marriage Records and Baptismal Registers

Upon the receipt of the notification of the nullity, the Ordinary of the place where the marriage was celebrated is obliged to command, as soon as possible, the rector of the parish in which the celebration of the marriage has been entered in the parish register, that he enter the record of the sentence of nullity, and likewise that he enter a similar record in the baptismal register, if either or both consorts have been baptized in that parish.

The rector of the parish, in turn, is obliged to record the sentence of nullity in the aforementioned registers. Moreover, if either or both consorts were baptized elsewhere he is obliged to apprise the pastor or pastors of the locality of baptism of the judicial sentence, so that these respective pastors may enter the record in their baptismal registers. When these obligations are accomplished he must apprise his own Ordinary

as soon as possible of the fulfillment of these duties (Can. 470 § 2; 1103 § 2; 1988; 2383; Art. 225).

XII. The Principal Differences in Practice Between Administrative and Judicial Procedure in Summary Cases

Since our treatment of summary cases is from the viewpoint that they are judicial by nature, it is necessary to indicate some of the principal differences between the two forms of procedure.[88]

The three principal points of divergence in the settlement of practical cases are:

A. The Rights of the Vicar General.
B. The Determination of Competency.
C. Remandment of the Case to the Collegiate Tribunal for Formal Trial.

A. THE RIGHTS OF THE VICAR GENERAL

The proponents of the view that a summary case is an administrative process permit the Vicar General to act as the *Ordinarius,* described in Canon 1990 and Articles 227-228 of the Instruction. There are dioceses where cases are thus decided. Until an authoritative interpretation is given by the Holy See, it appears that the Vicar General may thus continue to act as the *Ordinarius* in such cases, provided they are handled in an administrative manner. However, when summary cases are decided in a judicial manner it appears that the Vicar General may not be considered as the *Ordinarius.* This opinion is based on the wording of Article 3 § 2 of the Instruction, *Provida,* which states: "In this Instruction the name Ordinary does not include the Vicar General, whenever there is question of placing judicial acts, nor does it include religious Superiors" (Canon 1573 § 2).

[88] For a complete treatment of summary cases when viewed as administrative, cf. the excellent dissertation of Rev. Dr. Edwin J. Kennedy, *The Special Matrimonial Process in Cases of Evident Nullity* (Washington, 1935).

B. THE DETERMINATION OF COMPETENCY

When a summary case is treated as an administrative process, the norms enunciated in Canon 201 § 1 and § 3 are observed instead of those stated in Canon 1964. Consequently, in an administrative process the Ordinary may settle the case of his subjects, whether these are the petitioners or the defendants.

The proponents of the administrative opinion even permit the Ordinary to settle the cases of non-subjects. "Apparently this Canon is broad enough," says Kennedy, "to permit an Ordinary to handle marriage cases of non-subjects, administratively, as long as the interested third party is his subject, inasmuch as the Canon acknowledges an indirect jurisdiction." [89]

C. THE REMANDMENT OF CASES TO THE COLLEGIATE TRIBUNAL FOR FORMAL TRIAL

When administrative cases are remanded to the collegiate tribunal for formal trial, special attention must be given to the question of competency. There may be the possibility that the tribunal is not competent to adjudge the case according to the norms of judicial competency.

D. THE REMANDMENT OF CASES WHEN THE PARTIES HAVE CHANGED DOMICILE

Another difficulty which may arise in administrative procedure is this: A case is being tried, let us say, before a tribunal competent solely *ex domicilio*. During the course of the summary administrative process the parties move to another diocese. Later it is discovered that the entire case must be remanded to the collegiate tribunal for formal trial. Can the collegiate tribunal of the same diocese accept the case in formal trial? Was the competency of the tribunal so firmly and juridically established [90] by the administrative process that it may continue to try the case in formal trial? Obviously not.[91]

[89] Kennedy, *The Special Matrimonial Process*, p. 80.

[90] Can. 1725, 1 °, 2 °, 5 °; Art. 85.

[91] Can. 1964; Art. 3-12.

E. OTHER POINTS AND PROBLEMS IN ADMINISTRATIVE CASES

1. Cases Introduced by Non-Catholics and Apostates.
2. Cases of Persons Who Are the Culpable Cause of the Impediment or of the Nullity.

F. THE VALUE, IN FORMAL TRIALS, OF TESTIMONY TAKEN IN ADMINISTRATIVE CASES

It appears that in many administrative cases the testimony of the parties and witnesses is not taken in the form of a judicial deposition. Obviously, such testimony does not fulfill the requirements of law, in formal trials, and cannot be accorded full probative value.[92] Consequently, this means that the parties and witnesses would have to be summoned and questioned in proper judicial form. There is no need even to intimate that this may well entail difficulties and embarrassments at times.

Conclusion

In the foregoing monograph an effort has been made to consider every phase of summary cases. Many points treated here have never been discussed, insofar as we are aware, or even envisaged by authors. Hence, to us has fallen the unenviable lot of pioneering where angels fear to tread.

It is not unlikely that some may consider the judicial process in summary cases as too involved and burdensome. It is true that now and then an individual case might be completed with greater dispatch in an administrative manner. However, tribunals have discovered that where the judicial process is uniformly followed over a course of years, cases are handled just as expeditiously in the judicial manner as they could be in the administrative way. Moreover, the judicial process has safeguards and protective measures that more than warrant its observance.

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[92] Can. 1577 § 1; 1789-1791; Art. 155-159.

THE ORIGIN AND DEVELOPMENT OF CANON LAW *

THE late Supreme Court Justice Holmes was of the opinion that man is not always an end in himself.[1] This is in keeping with his views on the origin and nature of law: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become . . . The substance of the law corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." [2]

These sentiments of a great master of common law would seem at first sight to be wholly inapplicable to canon law as it is generally understood by those who are not familiar with its history or its practice. If civil law, and especially common law, is regarded as something flexible and readily adaptable

* Introductory lecture in a series of seven lectures on The Code of Canon Law to be given in the Auditorium of the Association of the Bar of the City of New York under the auspices of The Guild of Catholic Lawyers.

[1] "I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected"—from a letter to J. C. H. Wu, August 26, 1926; cf. Francis Biddle, *Mr. Justice Holmes* (New York: Scribner's, 1942), p. 125.

[2] *The Common Law* (Little, Brown and Company, 1881), Lecture I, "Early Forms of Liability."

to the changing circumstances of the times, canon law on the contrary is often conceived to be something rigid and inflexible, and so quite unsuited for the modern world. If common law rests upon no fixed and immutable principles, canon law is supposed to be rooted in dogma and to partake to a very great degree of the unalterable character of its foundation. Above all, if common law as it exists in this country and in England resists anything like codification, canon law is held to be almost by definition codified law, so that the new code of 1918 is simply the latest in a long series of codes by which the Church has been governed from the beginning.

It may readily be granted that there is a certain amount of misunderstanding between representatives of civil law and representatives of canon law, due to a lack of communication —or of enough communication—on both sides. Without this communication each side is deprived of valuable assistance in its own field. Besides, a freer communication between the two might result in the discovery that both have much more in common than appears at first sight.

Who, for instance, could be thought of as farther apart in their fundamental outlook on life and on law than Oliver Wendell Holmes and St. Thomas Aquinas? Yet I am not altogether sure that if these two could meet, they would be in such violent disagreement as some may imagine. When Justice Holmes as a lawyer does not regard the individual person as an ultimate, an end in himself, is he at variance with St. Thomas Aquinas? The latter, in answer to the question, "What is the end of law?", definitely excludes the notion that it is the welfare of the individual as such. In the eyes of the law the individual person is part of the community, and the part is of necessity subordinated to the whole. Law has for its object and end the common good, which is the welfare of the community. When the individual is considered by the law it is always because of his relation to the common good of the community, which is principally intended.[3] St.

[3] *Summa Theologica,* I-II, q. 90, a. 2.

Thomas bases his notions of the end of law on Aristotle, who declares in the *Nicomachean Ethics* and in the *Politics* that all the various pronouncements of the law aim at the common interest of all. When Aristotle spoke of the common good he had in mind the welfare of the society to which the individual person of his day was subordinated and of which he was a part and a member—the city-state; e.g. Athens. Today we simply call this the State.

While it may be true that Holmes "believed no more in principles than in causes," [4] it is still arguable that he must have agreed with the conception of the end of law such as we find it expressed in St. Thomas Aquinas. The unfortunate refusal of so many moderns, even when they unquestionably possess great ability, to think things through to their conclusions prevents them from seeing that often they are only in superficial disagreement with the great minds of the past. When we stop to consider it, what other end could law have except the general welfare, the common good, and not the private advantage of the individual as such? What then could be more reasonable than to ask that the private convenience and happiness of the individual step aside when there is question of the general welfare? This is what St. Thomas Aquinas explicitly says, and I think that this is all that Justice Holmes was trying to say. These two great minds seized the main point in the philosophy of law, even though they may have expressed themselves somewhat differently.

Here then is a principle that underlies law no matter what its form may be. It is difficult to see how there could be any such thing as a court of law if the common good were not paramount over private utility and advantage. There may be differences of opinion in a given situation as to just what is this common good, but that the law is always seeking the common good no one, I think, will deny. It is this principle that underlies the marriage legislation of the Church. Some may not regard the unity and indissolubility of marriage as pertaining to the common good. The Church with Christ

[4] Biddle, *op. cit.*, p. 125.

does, however, even when in a particular case the maintenance of these properties may seem to be in conflict with the personal advantage of the parties concerned. The real question is this: what does the general welfare, the common good of society, demand in these circumstances? It is not: what would be most conducive to the happiness of the persons involved? If we are looking for immutability, this principle of the common good as the basis and end of all law certainly has this character.

On the other hand, we must not go to the opposite extreme and regard all law as just as immutable as the principles upon which it is based. Mr. Justice Holmes refused to see anything immutable in law: it was for him essentially the work of experience and expedience. He is right—as far as the actually formulated legal enactments and interpretations, particularly in the field of common law, are concerned. If there is any immutability in law, it is not to be sought in the positive enactment or the particular application but in the principles that underlie the human work and the human element in law. I believe Justice Holmes had this in mind when he said of one who had accused him of "legal heresy": "I suspect he means a different thing from what I do by law and that the fight is more about words than he thinks." [5]

In all this matter it is necessary to bear in mind the analogy of law. Many of the difficulties in understanding just what is meant by divine law as opposed to human law, by natural law as opposed to positive or enacted law, tend to disappear when we realize that law is not a univocal term, used in exactly the same sense wherever it is found. The ultimate source of all law is God, whose intelligence and will are manifested either in the natures of things themselves (natural divine law) or by actual revelation (positive divine law). In the first sense we speak of a tree growing according to a law of its being, and of the law of gravity or the law of inertia; in the second sense we speak of the Mosaic and of the Christian law. Besides divine law and the natural law there is

[5] *Holmes-Pollock Letters* (2 vols., Harvard, 1941), II, 3.

human law, which can be either civil or ecclesiastical. Obviously, law does not mean the same in all these contexts. Because things that are closest to us and known directly by us must serve as a norm when we try to judge and understand more remote realities, it is evident that human law as it is known to us gives us a frame of reference within which we can understand, at least to some extent, what the term law means when it is applied to nature and when it is applied to God. This amounts to saying that in the three expressions—divine law, natural law, and human law—the term law is used not univocally but analogously; for the sense of the term, while it is partly the same, is also partly different.

Keeping the analogy of law in mind, it should not be difficult to see that the divine law and the natural law are rather on the side of principles, sources, or foundations of law: they underlie all human law, ecclesiastical or civil. All the immutability in law is on the side of these principles; what is mutable and flexible is found in the positive enactments and interpretations which competent authority issues in the course of time in order to keep human conduct within the bounds of the common good. History and experience will guide lawmakers in adapting legislation to the changing conditions and varying circumstances of life: what was good law under a feudal system would be bad law today. These human enactments must be flexible, otherwise law quickly degenerates into a dead letter; but this by no means implies that the principles upon which the law is based have no permanent and constant validity.

This distinction between the principle behind the law and the human enactment, no matter what its form may be, is necessary if we ever expect to solve what has been called the central issue of modern jurisprudence—whether law is discovered or made, whether it is a work of reason or of will.[6] The natural and divine principles and sources of law are not made: they are discovered. The positive enactment is made by hu-

[6] Mortimer J. Adler, "A Question about Law," *Essays in Thomism* (New York: Sheed and Ward, 1942), p. 207.

man beings; but if it is based upon and in accord with these principles, it will be a genuine work of reason and not a pure measure of expediency, reflecting political or social or some other kind of opportunism.

These considerations are needful in order to understand the mentality behind the subject of the course of lectures that will follow. The course will not treat of natural law nor even of divine law as such, but of the positive, human enactment called ecclesiastical or canon law. That there is such a thing as canon law is generally known. Why there should be a body of ecclesiastical law side by side with civil law may not be so well known. In other words, who gave the Church the right to pass laws? Has not the State alone this prerogative?

St. Thomas also furnishes us with an answer to this question. In the article quoted above he made the point that one man is only a part of a perfect community or society, which along Aristotelian lines is the city or state. From this he infers that lawmaking is not the work of one man but of the whole community; and if it is at times left to one man to make the laws, this is because he happens to be a public person who has the care of the whole community upon his shoulders. The reason is always the same: law, first and last, regards the good of the community as a whole rather than the private good of its individual members. For this reason only the *civitas,* the State, in the proper sense can pass a law. Lawmaking is the peculiar prerogative of a perfect society.[7]

What does St. Thomas mean by a perfect society, of which the State is an outstanding example? In the first place, it is a juridical society and not merely a friendly or social group. This means that its members are bound together by laws or pacts, giving rise to rights and duties, and not merely by the ties of friendship or sociability. Not every juridical society, however, is what is called a perfect society. It may be only an imperfect society, even though it is juridical. This is the case when it depends upon another society as a part depends

[7] *Summa Theologica,* I-II, q. 90, a. 3.

upon the whole. The absence of a dependence of this kind is the second requirement for a perfect society.

An imperfect society has not at its disposal all the means that are necessary for it to use in order to reach its end. A commercial society in reference to the State or a diocese in reference to the whole Church are examples of imperfect societies. Each of these juridical bodies is subordinate, even in its own order, to a larger body and neither has at its disposal all the means that it needs to enable it to achieve its purpose. Each is a part in a larger whole. A perfect society, however, is not subordinate to another in its own order, neither does it bear the relation to another of a part to a whole. For this reason not even the family, which is called the unit of society, is a perfect society, any more than the various business societies that are chartered by the State. In the complete sense of the term there are only two perfect societies: the State and the Church. The State is the perfect society in the temporal order, as the Church is the perfect society in the spiritual order.

Because the Church is a perfect juridical society in its own order, it has the threefold power that belongs to such a perfect society—legislative, judicial, and executive. It is composed of members, admitted by baptism, who are working together towards a common end, their eternal salvation, and using means which are thoroughly sufficient and adequate to attain this end; for example, the sacraments, a common faith, subordination to a visible head, the observance of its laws. Because the Church is a juridical society it can pass laws for its own welfare and it can oblige its members to observe them if they wish to remain members of this juridical society. These laws constitute the body of ecclesiastical or canon law.

Canon law is thus remarkably parallel with civil law. The two agree in that they are human laws of a perfect society on earth, in spite of the fact that Church and State function in different spheres. Canon law is not exactly the same as divine law, neither is it the same as natural law. If at times it has been called divine law, this expression points

to one of the sources of canon law—the other source being natural law — rather than to the ecclesiastical law itself. That there is a real difference between canon law on the one hand and divine and natural law on the other is clear from the fact that canon law has had an origin in time, a history, and a development, as it will one day have an end. All this cannot be said, at least if we are speaking properly, of either divine law or natural law. Again we see the analogous character of the term law.

The word canon (from κανών) means a rule or practical direction. Early in the history of the Church it came to have a purely ecclesiastical significance as opposed to νόμος, which was the term used to designate civil law. In the fourth century the term canon (κανών) was applied to the ordinances of the Church Councils, as νόμος was applied to the ordinances of the civil authorities. Sometimes the term *nomocanon* was given to collections of regulations in which laws formulated by both the civil and the ecclesiastical authorities on ecclesiastical matters were found side by side.

Before the twelfth century the body of ecclesiastical legislation was in the process of formation and the terms used indicated this—*canones, ordo canonicus, sanctio canonica.* The expression "canon law" (*jus canonicum*) became current only about the beginning of the twelfth century, as opposed to civil law (*jus civile*). Later there comes into existence the *corpus juris canonici* corresponding with the *corpus juris civilis.* From this moment on the expression canon law means the law of the *corpus juris;* while the expression "ecclesiastical law" remains somewhat wider, including all the laws of the Church, even those outside the *corpus juris.*

It must not be forgotten that the Church existed for a long time before it had a complete and coordinated system of laws. Many daily acts of administration, while objectively they were canonical or ecclesiastical, were of the same nature as similar acts in civil matters; for example, the making of

contracts, entering into obligations, and in general the administration of property. It was quite natural for the Church to accommodate itself in these matters to the existing laws. Hence it came to pass that when the canonists of the twelfth century began to systematize the ecclesiastical laws, they were confronted by, on the one hand, an incomplete and fragmentary canon law, and, on the other, a complete and systematic Roman Code. They naturally had recourse to the latter to make up for the deficiencies of the former. This is the meaning behind the axiom of the canonists which was inserted in the *Corpus Juris* to the effect that the Church acts according to Roman laws when canon law is silent.[8] Among the Teutonic tribes and kingdoms, which had their own laws, the clergy, nevertheless, followed Roman law. In the course of time, however, as written canon law increased, the importance of Roman law declined in the Church. It may be said in a general way that canon law took over from Roman law all that relates to obligations, contracts, judiciary actions, and to a great extent civil procedure. Sometimes laws that were secular in origin but which concerned ecclesiastical matters—for example, the Byzantine ecclesiastical laws—were formally approved. Even today canon law may give an ecclesiastical effect to a law that is civil in origin and in character; for instance, the impediment of marriage that arises from adoption.[9]

The juridical influence of Teutonic law on canon law was much less important than that of Roman law, yet there are traces of this influence in ecclesiastical legislation; for example, what Boudinhon quaintly refers to as " the somewhat feudal system of benefices," [10] the computation of the degrees of kindred, the assimilating of the penitential practices to the system of penal compensation (*wehrgeld*), and, only for a time, justification from criminal charges on the oath of guarantors or co-jurors. Inevitably there was a certain amount of

[8] C. 1, X, "*De novi operis nunciatione*," V, 32.

[9] Cf. C.I.C., Cann. 1059 and 1080.

[10] A. Boudinhon, " Law, Canon," *The Catholic Encyclopedia*, IX, 60. I am indebted to this author for much of the historical data in the present article.

adaptation on the part of the Church to the customs of the nations among which it lived, and this can be seen reflected in her legislation. The Church is not an abstraction, above time and space; it is part and parcel of the people who constitute it. It is in the world as well as above the world.

As far as modern law is concerned, its influence on canon law may be expressed somewhat summarily as follows: the Church conforms to civil laws on mixed matters, especially in regard to the administration of its property.

It may be said, therefore, that besides divine law and natural law, even civil law is a source of canon law. From the standpoint of form, just as in civil law there is common law and statute law, so canon law embraces written law (*jus scriptum*), which is law framed and promulgated by competent authority, and unwritten law (*jus non scriptum*); and even customary law, resulting from custom and practice. Unwritten law became of less importance as written law developed. From the standpoint of subject-matter canon law may be divided into public law (*jus publicum*), which affects the Church as a society, and private law (*jus privatum*), which affects the internal organization of this society—the functions, rights, duties, etc., of its members. Public law is external (*jus externum*) when it determines the relations of the Church as a society with other societies; for example, the State. It is internal (*jus internum*), when it regulates and determines the relation between the church authorities and its members. Geographically there is the canon law of the Western or Latin Church, and the law of the Eastern Churches.

Chronologically the development of canon law unfolds in three epochs. 1—From the beginning to the Decree of Gratian (12th century). 2—From Gratian to the Council of Trent (16th century). 3—From Trent to the *Codex Juris Canonici* of 1918. We are now of course in a fourth epoch, when for the first time in its history the Latin Church is living under a genuine codified law.

1. Although, as we have seen, the legislative power has always existed in the Church, and for that matter was constantly exercised, yet a long period had to elapse before her laws were reduced to a harmonious and systematic body. Legislative bodies do not as a rule make laws except when circumstances require them. For centuries nothing more was done except to collect the canons of councils, the letters of popes, and episcopal statutes. No one thought of extracting general principles from them or of systematizing all the laws which were then in force. The order followed in these collections was purely chronological.

In the eleventh century certain collections of canons were made which began to group under the same headings the canons that treat of the same matter. The order changed from chronological to topological. It is, however, only in the middle of the twelfth century that the first really scientific treatise on canon law comes into existence—the famous Decree of Gratian. The school of Bologna had just revived the study of Roman law, and Gratian sought to inaugurate a similar study of canon law. A difficulty presented itself, however, to Gratian, which did not exist for the student of Roman law.

While there were compilations of texts and official collections available for Roman law, the *Corpus Juris Civilis*, there was no such collection or *corpus* available for canon law. Gratian, therefore, set about to make one. He adopted the plan of inserting the texts of laws into the body of his general treatise. From the disorganized mass of canons which confronted him, he selected only the laws which were actually in force—eliminating the rest—and also the principles underlying the laws. He framed a system of law which was incomplete, indeed, but it was at least methodical, so that it can be said that the science of canon law dates from him. This is all that the celebrated *Decretum* of Gratian is—a text book and treatise on canon law. It was never an official collection of law authorized or promulgated by the Church. Its commonly accepted title—*Decretum*—might give this impression, but it must be remembered that no private person can make an of-

ficial *corpus juris*. Its real title tells us exactly what it is—*Concordantia discordantium canonum*.

2. Gratian's Decree was welcomed and taught by the canonists of Bologna and then in other schools and universities. It was for a long time the text book of canon law. In time, however, the imperfections in Gratian's plan led to a desire for an improvement in method. Out of this came the method adopted by Bernard of Pavia in his *Breviarium* and by St. Raymond of Penyafort in his official collection of the Decretals of Gregory IX, promulgated in 1234. These collections grouped their materials into five books, each book being divided into titles, and each title into chapters. Under each title were the decretals, or portions of decretals, arranged in chronological order. The five books treated successively of: 1—persons possessing authority in the church; 2—procedure; 3—the clergy and matters pertaining to them; 4—marriage; 5—crimes and penalties. St. Raymond of Penyafort's collection, while it was not perfect, was at least official and it served as the basis for almost all canonical works up to the sixteenth century, and even to modern times, before the Code.

This method of collecting authorities was followed for some time longer. Besides many private collections, the Popes continued to keep up to date the Decretals of Gregory IX. In 1245 Innocent IV sent a collection of 42 decretals to the Universities. Gregory X and Nicolas III likewise added to the existing *Corpus Juris*. In 1298 Boniface VIII published an official collection to complete the five existing books, and this became known as *Sextus*, i.e., *Liber Sextus*. Clement V also prepared a collection which, in addition to his own decretals, contained the decisions of the Council of Vienne (1311-12). This was published in 1317 by his successor John XXII and called the *Clementinae*. This was the last of the medieval official collections. Two later compilations included in the *Corpus Juris* are private works, the *Extravagantes* of John XXII (1325) and the *Extravagantes Communes*, a later collection. The term *Extravagantes* generally speaking refers to

laws that are not contained in the authentic collections of decretals.

In this way the *Corpus Juris* closed. When we speak of the closing of the *Corpus Juris* we do not mean that it was officially closed by papal decree forbidding canonists to collect new documents or to add to the former collections. The expression simply means that the canonical movement, which was so active since Gratian's time, came to its natural term. External circumstances, such as the Western Schism, the troubles of the fifteenth century, and then the Reformation, were unfavorable to the compiling of new canonical collections. The main point is, however, that these great collections of decretals had served their purpose, which was to establish just what the law was in order to make it possible to systematize it. In these great collections canonists could find gathered together the specific decisions from which they were able to draw general principles.

3. After the fourteenth century canon law began to lose the unity it had acquired from these collections, although it never lost contact with them. The actual law, however, was now found in the works of the canonists rather than in any specific collection. Because there was no one, general, official collection, each canonist gathered his texts where he could. This does not mean that a period of confusion set in so much as one of isolation and dispersion. This is indicated by enumerating the principal sources of law later than the *Corpus Juris*, viz. the constitutions of popes; the acts of Councils, especially of the Council of Trent (1545-1563), which was almost a code in itself; the rules of the Apostolic Chancery; the decrees, decisions, and various acts of the Roman Congregations. For local laws there are the provincial councils and diocesan statutes.

In the sixteenth century another change is observable. Decretalists began to apply not only to official collections but to their own lectures on canon law the method and divisions of the Institutes of Justinian (553 A. D.). This means that in-

stead of the division found in the *Corpus Juris* the following arrangement was adopted: 1—persons; 2—things; 3—actions or procedure; 4—crimes; 5—penalties. This plan was popularized by the *Institutiones Juris Canonici* of Lancellotti (1563) and it was followed by most canonist authors of *Institutiones* or manuals of introduction down to modern times, although there was considerable variation in the subdivisions. While this new division made for greater clarity and simplicity, yet most of the more extensive works on canon law preserved the order of the Decretals of Gregory IX.

It should now be plain that the Code of 1918 is not properly speaking a New Code, as it is sometimes referred to by those who are under the impression that the Church has lived under codified law from the beginning, or at least that the *Corpus Juris Canonici* was a code of laws. Strictly speaking this is not true. The method followed both by private individuals and by the popes in drawing up canonical collections is rather that of a coordinated compilation or juxtaposition of documents than codification in the modern sense; that is, a redaction of all the laws to an orderly series of short, precise texts.

Since the closing of the *Corpus Juris* two unsuccessful attempts were made at a codification of canon law, and one successful. The first unsuccessful attempt was in 1590 when an unofficial *Liber Septimus* was published by private authority in Lyons as a supplement to an edition of the *Corpus Juris.* Before this, in 1582, when the official edition of the *Corpus Juris* was published, Gregory XIII appointed a commission to bring this *Corpus Juris* up to date and to complete it. The work continued under Sixtus V; and finally, under Clement VIII there issued what was supposed to be a *Liber Septimus,* in 1598. This collection contained pontifical constitutions and the decrees of the Council of Trent inserted among the decretals. This work, however, was no great improvement over its predecessor and Clement VIII refused to approve it, and the project was abandoned.

Many times during the nineteenth century, but especially at the Vatican Council in 1870, the bishops urged the Holy See to draw up a complete collection of the laws in force in the Church, adapted to the needs of the day. As a result the beginnings of a genuine codified law began to be seen. Under Pius X certain constitutions were drawn up in short, precise articles, which was a novelty and the beginning of codification. Finally, Pius X officially ordered a codification in the modern sense of the term of the whole of canon law. In the first year of his pontificate (1904) he issued a *Motu Proprio* (*Arduum sane munus*) which set on foot the reforming and codification of canon law. For this purpose the Pope requested the entire episcopate, grouped in provinces, to make known to him the reforms they desired. At the same time he appointed a commission of consultors, on whom the initial work devolved, and a commission of cardinals, who were charged with the study and approval of the new text, subject later to the sanction of the sovereign pontiff. The secretary of his commission of cardinals and the guiding spirit of the whole work was Peter, Cardinal Gasparri. Piux X died and under his successor, Benedict XV, the Code was finally published on Pentecost, May 27, 1917, to take effect the following Pentecost, May 19, 1918.

Now for the first time in its history the Church of the West is governed by a genuine code of laws. It is interesting to note that the codification of the laws of the Eastern Churches is also under way.

The Code follows the classical division into five books, but the canons are numbered consecutively, regardless of the books, from 1 to 2,414. In quoting, therefore, seldom is it necessary to refer to a book or to a title or chapter within a book: simply the number of the canon is given, and that is all. This is one of the great simplifications which the Code has introduced into the study and practice of canon law.

The five books deal with the following topics:

Book 1 with general norms;

Book 2 with persons: clerics, religious, and lay;

Book 3 with things: which means 1—the sacraments; 2—times and places; 3—divine worship; 4—the teaching authority of the Church; 5—benefices and other ecclesiastical institutions; 6—the temporal goods of the Church;

Book 4 with processes: this includes trials, the canonization of saints, and other methods of procedure;

Book 5 with crimes and penalties.

It does not come within the scope of this paper to enter into the details of the reforms in legislation introduced by the Code. Subsequent lectures will give analyses of the five books and their contents. It can be said, however, that the Code of 1918 does in an official way what the *Decretum* of Gratian did unofficially in 1140: it introduces system and order where system and order were sorely needed. In another sense the Code of 1918 stands alone, for it marks a date in the history of the Church when for the first time a genuine code takes the place of a compilation or a collection. The Church in her wisdom, however, is under no illusion as to the nature of this Code. Far from regarding its canons as immutable as Scripture or as revealed doctrine she expressly provides for future alterations and adaptations of her code to keep it always abreast of changing times and circumstances. In the beginning of the Vatican edition of the Code is the *Motu Proprio* of Benedict XV, dated September 15, 1917, by which he established a commission for authentically interpreting the Code and also provided for the insertion of new canons into the Code itself if in the course of time this should become necessary and opportune. All he asks is that the present order and numeration of the canons be not disturbed, but that any additions be made in the form of replications of the present canons.

With this introduction to the Code I shall leave you, trusting that you will find it possible to attend the remaining lectures of this course. There you will find in detail just what the law is that governs the Church today.

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NEW YORK, N. Y.

THE FUNDAMENTAL PRINCIPLES OF THE PHILOSOPHY OF CANON LAW *

TO jurisprudence law is not only the object of an abstract science, or a theory of the nature of law according to a particular philosophical system, but also the expression of those concepts which underlie, as the basic principles, the order and structure of the society for which it is given. In considering law from this point of view, it can be regarded as consisting of the rules governing the conduct and the interests of men within the framework and limits of a society.[1] Law is an eminently important instrument in any society, a link between men, and between men and the bearer of authority. Law, one of the essential elements in the life of men as social beings, reflects the development and tradition of a nation or of any other kind of society endowed with legislative authority. The change involved in the progress or decline of philosophical views is also manifested in the "rules governing the conduct and the interests" of a particular society. The legal systems of the United States or Great Britain, as compared with those of China or Russia, or of Germany or Japan, provide practical examples of the distinctive variety of fundamental concepts as expressed in the world of law. Each system certainly is based on the same philosophical principles that are manifest in the life of these nations.

What has been said here of the legal systems of various states, can be said, in an even more appropriate sense, of Canon Law, the legal system of the Church. It is said, in an even more appropriate sense, for Canon Law is not only the manifestation of the Church's ideas on ecclesiastical law

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[1] Gavit, *Cases and Materials on an Introduction to Law and the Judicial Process* (1936), p. 1; Clarke, *The Soul of the Law* (1942), p. 95.

proper, but also, in many respects, the expression of Catholic principles of legal philosophy in general. If we make the restriction "in many respects," we do it for obvious reasons, arising from the distinct natures of the State and the Church. However, aside from this differentiation which ascribes to both societies a particular sphere of interests, and therefore also of particular and distinct norms, the fundamental principles of law, as to be found in Canon Law, are those of Catholic legal philosophy in general.

Both Church and State are societies. Generally speaking, a society is a union of men for the attainment of a common end by common means.[2] The ends of the Church and the State are separate and distinct, but not absolutely independent.[3] The purpose of the Church is the sanctification and the consequent salvation of souls.[4] Thus the Church is entrusted with man's spiritual well-being. However, it is not a mere natural well-being the Church is concerned with, but a supernatural one. The purpose of the Church, as a social organism, extends far beyond the reach of any human society. In order to fulfill this task, the Church is endowed by her Divine Founder with the power of Orders, and the power of Jurisdiction, ultimately enshrined in the *jus clavium* of the Vicar of Christ on Earth, the Roman Pope.[5]

[2] Leo XIII, Encyclical "*Immortale Dei*," November 1, 1885, *A.S.S.*, XVIII (1885), 162-179; cf. Koenig, *Principles for Peace* (1943), pp. 25 sq.; Ryan, *Principles of Episcopal Jurisdiction*, The Catholic University of America, Canon Law Studies, n. 120 (Washington, D. C., 1939), p. 6.

[3] Ottaviani, *Institutiones Iuris Publici Ecclesiastici* (1935-1936), I, 160; Friedberg, *Die Grenzen zwischen Staat und Kirche* (1872); Cathrein, "Die Aufgaben der Staatsgewalt und ihre Grenzen"—*Stimmen aus Maria Laach*, 6. Ergaenzungsband (1883); Hergenroether, *Katholische Kirche und christlicher Staat in ihren geschichtlichen Entwicklung* (1872); Hohenlohe, *Grundlegende Fragen des Kirchenrechts* (1931), pp. 19 sq.; McCloskey, *The Subject of Ecclesiastical Law according to canon 12*, The Catholic University of America, Canon Law Studies, n. 165 (Washington, D. C., 1942), p. xiii.

[4] Simpson, *The Catholic conception of the Church* (1914); Ritley, *The Anglican theory of the Catholic Church* (1916); Newton, *Catholicity* (1918); Saegmueller, *Lehrbuch des katholischen Kirchenrechts* 4 (1925), vol. I, 1, pp. 30 sq.; Ryan, *op. cit.*, p. 7; McCloskey, *op. cit.*, p. xiii.

[5] Matth. xvi, 19; xviii, 18; John xx, 23; Pius X, Encyclical "*Pascendi*", Sept. 8, 1907—*Fontes*, n. 680; Ryan, *op. cit.*, p. 7.

The State, on the other hand, has a natural purpose in being entrusted with man's temporal welfare by securing the unalienable rights, and "among these are Life, Liberty and the pursuit of Happiness." [6]

The accomplishment of the ends of both the Church and the State is guaranteed by their being endowed with the necessary power and authority. Both are perfect societies. Both derive their authority and powers "from one sole and single Source, namely God, the Sovereign Ruler of all. There is no power but from God." [7] As perfect societies both Church and State have also a complete juridical organization, enjoying the threefold function of making laws, of enforcing them, and of judicially applying them.[8]

Although both societies are independent of each other, necessary connections exist between these two powers for the very obvious reason that the member of the Church is, at the same time, also a member of the State.[9] The Catholic, therefore, is subject to two distinct juridical orders, namely the order of the Church and that of the State. It is not only a postulate of religious liberty and of liberty of conscience, as proclaimed by the modern civilized State, but also a very fundamental claim of the Church that neither society must interfere with the other's order in such a way that it might result in a conflict of rights and duties of the Catholic citizen in his twofold capacity of Catholic and citizen, or in a violation of the legitimate sphere of either authority. "Whatever, therefore, in things human is of sacred character, whatever belongs either of its own nature or by reason of the end to which it is referred, to the salvation of souls, or to the worship of God, is subject to the power and judgment of the Church. What-

[6] Declaration of Independence.

[7] Leo XIII, Encyclical "*Immortale Dei*," *loc. cit.* (translation taken from Koenig, *loc. cit.*, no. 52, and p. 2523).

[8] McCloskey, *op. cit.*, p. xiv.

[9] For a fine and detailed analysis cf. Roelker, "The Citizen of the State and the Faithful of the Church"—*Ecclesiastical Review*, CVII (1942), 337 sq.

ever is to be ranged under the civil and political order is rightly subject to the civil authority." [10]

Besides the vast field of matters which definitely are rendered exclusively either to the Caesar or to God, there are matters which are called by canonists "res mixtae," whose nature makes them objects of both societies in one or the other way.[11] It is a task of policy and understanding on both sides, truly "for the sake of peace and liberty," [12] to make the necessary arrangements in order to apply justice and equity to the legitimate claims of both authorities. The history of the relations between Church and State are full of examples of the conflict of interests, but also of sincere endeavors to define and agree on the positive limits of the spheres of both authorities.[13]

The Church is, from the standpoint of juridical and social polity, a perfect, but unequal society. This inequality is caused principally by the organic structure of the Church, dividing the members into two genuinely distinct groups, the clergy and the laity.[14] It is an inequality of rights and duties which bestows upon the clergy the higher rank. However, this is by no means an unjust inequality, based upon abuse or usurpation, but deriving from the will of the Divine Founder of the Church.[15] The power of the clergy is received from sacred orders. Legitimate ordination or consecration are the necessary and indispensable requirements for access to the clerical state. Ordination or consecration are absolute requisites for appointment to the ecclesiastical offices of the Church, and to the capacity of participating in the juridical power of the Church. The organization of the clergy is hierarchical as to the power of orders as well as to jurisdiction.

[10] Leo XIII, Encyclical "*Immortale Dei*," no. 51—Koenig, *loc. cit.*

[11] Haring, *Grundzuege des Katholischen Kirchenrechtes*, I (1924), 44; Hammerstein, *Kirche und Staat vom Standpunkt des Rechtes aus* (1883), p. 118.

[12] Leo XIII, Encyclical "*Immortale Dei*," no. 58—Koenig, *loc. cit.*

[13] Saegmueller, *op. cit.*, pp. 47 sq.

[14] Haring, *op. cit.*, I, 41 sq.

[15] Can. 107.

However, we repeat, this organic division of the Church into clergy and laity is, although unequal, not unjust. It is, in fact, from the standpoint of legal philosophy, a clear expression of the fundamentals of justice, namely, "suum cuique tribuere."[16] The clerical state is no profession composed of Church officers, depending on an appointment by a ruling class which selects arbitrarily among the members of the Church; it is, on the contrary, a vocation, depending on the free will of the Catholic who wants to enter the clerical state. The Code is very strict in prescribing norms prohibiting the illicit access to the Holy Orders.[17] Nobody can be forced to receive the ordination,[18] and the Church takes pains to eliminate candidates, unsuitable *ex defectu* or *ex delicto*.[19] Besides these precautionary measures, the law also provides sanctions against those who violate the norms concerned.

The outstanding position of the clergy is also accompanied by protective norms, intended to safeguard the particular mission it has to fulfill.[20] On the other hand, the Code also prescribes higher duties and obligations for the clergy,[21] than for the laity.[22]

It is said sometimes that the law of the Church is by far more a law of the clergy than that of the laity.[23] It is also pointed at canon 682[24] in order to strengthen the argument that the laity is but the receiving and passive partner in the community of the Catholic Church.[25] However, this inter-

[16] Cicognani, *Canon Law* (2. ed., 1935), p. 12.

[17] Can. 951 sq.

[18] Can. 214; can. 971.

[19] Can. 983 sq.

[20] *E.g., privilegia clericalia*—can. 118 sq.

[21] Can. 124 sq.; cf. Saegmueller, *op. cit.*, pp. 353 sq.

[22] Cf. Haring, *op. cit.*, I, 122.

[23] Stutz, "Der Geist des Codex Iuris Canonici"—*Kirchenrechtliche Abhandlungen*, Heft 92 and 93 (1918), p. 83.

[24] "Laici ius habent recipiendi a clero, ad normam ecclesiasticae disciplinae, spiritualia bona et potissimum adiumenta ad salutem necessaria."

[25] Stutz, *ibid.*, p. 84.

pretation does not properly conceive the idea of Canon Law.[26] It is just this canon 682 which reveals one of the fundamentals of the Law of the Church by insisting on the right of the laity to receive from the clergy the spiritual goods for the sanctification of life. If we want to consider this canon in the proper way, we have to regard it as the expression of the most important fundamental right of the lay member of the Church. The purpose of the Church is the sanctification and salvation of souls. To reach this end the Church was entrusted by Christ with supranatural means whose ministration to the faithful is not only an essential obligation of the clergy, but also an elementary right of the laity. This is, in the true sense, also the fundamental purpose of the Code, namely to safeguard this right of the laity. It is not the numerical quantity of canons, concerning a given matter which manifests its relative importance, but their implicit or explicit tendency which is the decisive indication of the import of the law.[27] The administration of the Church's spiritual treasure, and its ministration to the faithful is a principal aim. The Church, according to her law, is neither the "Church of the Clergy,"[28] nor is her law "almost without any exception"[29] a purely clerical law. It is, in fact, and in its innermost sense, the law of the Church, embracing all members for the sole and common purpose, namely to reach the eternal end, as willed by the Founder.

Another feature of the social structure of the Church is the peculiar form of admission to membership.[30] Unlike the usual

[26] Lentner, "Der Anteil der Laien an der Kirche"—*Oesterreichische Akademische Blaetter* (1937), pp. 31 sq.; also cf. Haring, "Das Laienelement in der Verfassung und Verwaltung der katholischen Kirche"—*Theologie und Glaube,* III (1911), 190 sq.

[27] This is similar to the implicit and explicit purpose of secular law with regard to administration of the state: it has to serve the aims of the community as well as the individual member, and the citizen has a *right* to see these aims as nearly as possibly achieved.

[28] Stutz, *op. cit.,* p. 83.

[29] Stutz, *loc. cit.*

[30] McCloskey, *op. cit.,* p. xiii.

way of acquiring the citizenship of a state by being born of citizen-parents, or by being born in the territory of a state, the admission to Church membership requires a particular spiritual act, namely the administering of the sacrament of baptism to the *baptizandus*. One cannot be born a Catholic as one can be born a Jew. Baptism is the necessary element in making a person a member of the Church. Catholic parentage as such is not sufficient. It is an obligation laid upon the parents, to make their descendant a participant of the Church by securing baptism for him. Catholic parentage, however, is a determining element with regard to the rite into which a descendant has to be baptized, for the children have to be baptized in the same rite as have been their parents.[31] This is a very important principle, because the rite of baptism decides to which law system of the Church the baptized person will be subject the moment he becomes a member of the Church. Only Roman (Latin) Catholics[32] are subject to the Code, while Catholics of the various Oriental Rites are subject[33] to the general and particular laws of their respective disciplines.[34]

Canon Law is defined as " the body of laws made by the lawful ecclesiastical authority for the government of the

[31] Can. 98, § 1, § 2, § 3; cf. also can. 756, and the Decree of the Sacred Congregation for the Oriental church, "*Cum data fuerit*," March 1, 1929, art. 42—*A.A.S.*, XXI (1929), 152.

[32] More properly: Roman Catholics of the Latin Rite; cf. Koestler, " Das neue oesterreichische Konkordat "—*Zeitschrift fuer Oeffentliches Recht*, XV (1935), 5 sq.; also Koestler, " Grundfragen des Konkordats-Eherechtes "—*Juristische Blaetter*, LXIV (1935)), 135; and Koestler, *Das Oesterreichische Konkordats-Eherecht* (1937), p. 11.

[33] Cf. can. 1; Herman, " De ' ritu ' in iure canonico "—*Orientalia Christiana*, XXXII (1933), 96 sq.; Herman, " De conceptu ' Ritus ' "—THE JURIST, II (1942), 333 sq.; Cicognani, *op. cit.*, pp. 444 sq.

[34] There are five Oriental Disciplines: Byzantino-Slavic, Alexandrine, Antiochene, Chaldean, and Armenian; cf. Korolevskij, " Introduzione agli Studi Storici delle Fonti "—*Codificazione Canonica Orientale, Fonti*, VIII (1932), 15 sq.; regarding the validity of the universal law of the church for Orientals, cf. can. 1, and Herman, " De ' ritu ' . . ."—*ibid.*, pp. 117 seq.

Church." [35] Canonists speak of the following divisions of the Law of the Church: [36] The Divine Law which is either positive Divine Law (*ius divinum positivum*), or Natural (Divine) Law (*ius divinum naturale*). The positive Divine Law originates from direct Divine instructions to be found in the Sacred Scriptures or preserved in the teachings of the Fathers. The natural Divine Law is revealed to man by reason. It is the task of the infallible *magisterium* of the Pope to declare what is Divine Law. Thus Divine Law can only be declared, but it cannot be created by any human lawgiver. [37] Divine Law is as unchangeable as is its Lawgiver. [38] The positive norms of Divine Law are very few and mostly enshrined in the constitutional principles of the Church.[39]

Subordinate to Divine Law we find the wide field of the mere human ecclesiastical law, the *ius mere ecclesiasticum*. It comes into existence by an act of the legitimate and competent lawgiver, or by recognition of custom through the lawgiver. The Code also knows these divisions. However, they are no mere juridical terms of modern science alone, but, as history proves, standard teaching of the Church.[40]

The operation of Canon Law differs in many aspects from that of Secular Law. This is not only due to the different spheres and aims of both the secular and ecclesiastical socie-

[35] Cicognani, *op. cit.*, p. 43.

[36] Koestler, "Der Aufbau des katholischen Kirchenrechtes"—*Zeitschrift fuer Oeffentliches Recht*, VI (1927), 479 sq.; Eppler, *Quelle und Fassung des katholischen Kirchenrechtes* (1928), pp. 11 sq.; Ploechl, "*Das Legitimitaetsproblem und des kanonische Recht*"—*Zeitschrift fuer Oeffentliches Recht*, XVIII (1938), 43.

[37] That Natural Law can only be declared but not be given by the human legislator is also contained in Jefferson's philosophy—cf. Ploechl, "Thomas Jefferson, Author of the Statute of Virginia for Religious Freedom"—The Jurist, III (1943), 212, pp. 214 sq.

[38] Roesser, *Goettliches und menschliches, unveraenderliches und veraenderliches Kirchenrecht* (1934), pp. 146 sq.

[39] Eppler, *op. cit.*, pp. 20 sq.

[40] Koestler, "Aufbau . . ."—*ibid.*, pp. 479 sq.

ties.[41] It is also caused by the very distinct power conferred upon the Church. While the Secular Law reaches only the external field of man's conduct and interests, the Law of the Church has also power with regard to her spiritual goods,[42] and extends even into the sphere of man's conscience. We speak, therefore, of the *forum externum,* embracing the external field of law, and of the *forum internum,* or forum of conscience.[43] This power, completely alien to Secular Law, enables the Church not only to harmonize a possible conflict between the external field of law and the dictates of conscience, but also to relieve man's conscience of the difficulties of such a conflict for the forum of conscience only, if, for particular reasons, a re-adjustment in the external field is impossible.[44]

A question which sometimes arises is whether Canon Law is based on the personal or territorial principle. Canon 8, § 2 says: "Laws are presumed to be not personal but territorial, unless the law indicates that it is a personal law." Thus the lawgiver declares that an ecclesiastical law is presumed to be territorial, unless otherwise indicated.[45] On the other hand, canon 1 states of the Code that although "there frequently is reference to the discipline of the Oriental Church also, it nevertheless concerns the Latin Church only and does not obligate the Oriental unless it is treating of those matters which from the very nature of the case affect also the Oriental." However, there is only a seeming contrast between these two canons. The first canon states a general principle while the eighth speaks of the application of the law to those subject to it. According to the general principle, as indicated in canon 1, the Code is based on the principle of personality, while its individual application is presumed to be territorial. This has to be kept in mind very clearly. It gives evidence that the

[41] Cf. *supra,* pp. 71-73.

[42] *E.g., ius sacramentale.*

[43] Koestler, "Aufbau . . ."—*ibid.,* p. 479; Haring, *Grundzuege* . . . ., 40.

[44] *E.g.,* a dispensation for the forum of conscience only.

[45] Cicognani, *op. cit.,* pp. 544 sq.

basic principle of the Church Law is personal, while the application, the method of applying the law, is territorial. Besides canon 1, canon 756 furnishes further fundamental support to this argumentation by prescribing that the descendant must be baptized in the rite of the parents, or of the father, unless otherwise indicated, if the parents belong to different Catholic disciplines.[46] Violation of this prescription, or the extraordinary ministration of the sacrament of baptism by a priest of another Catholic rite, although the baptism is valid, has no effect with regard to the rite. The baptized person belongs to the rite according to which he should have been baptized.[47] Since the juridical effect of baptism means that a Catholic is ascribed and subject to a particular juridical discipline of the Church, from which he cannot change to another Catholic discipline without special permission from the Holy See,[48] we have another reason to hold that basically Canon Law is personal rather than territorial.

It is sometimes said that the Law of the Church lacks an essential requirement of true law, namely force. The Church, it is held,[49] can only "suggest" the fulfillment of her norms, but she cannot, for lack of direct or indirect physical force, compel her subjects to obey these norms. According to this theory, these norms are rather ethical than juridical. The State must be relied on to lend its secular arm to enable the Church to carry out her laws. This theory, clearly out of accord with Catholic teaching concerning the Church's power as a perfect society,[50] narrows the effectiveness of law in general

[46] Can. 756, § 1, § 2.

[47] Can. 98, § 1.

[48] Can. 98, § 3; cf. Decree of the Sacred Congregation for the Oriental Church, "*Quo firmior,*" November 23, 1940—*A.A.S.*, XXXIII (1941), 28.

[49] For a critical analysis cf. Saegmueller, *op. cit.*, pp. 9 sq., and Hohenlohe, *op. cit.*, pp. 1 sq.

[50] Cf. thesis no. 24, condemned by the "Syllabus" of Pius IX (Encyclical "*Quanta cura,*" December 8, 1864—*A.S.S. III* [1867], 160 *sq.*): "Ecclesia vis inferendae potestatem non habet, neque potestatem ullam temporalem directam vel indirectam"; cf. also Ploechl, "The Philosophy of Legitimacy"—THE JURIST, III (1943), 86.

in a very dangerous way. It is true that the various schools of legal positivism hold, to a lesser or greater degree, that law as such requires physical force. In their view, law without physical force lacks an essential element and becomes ineffective.[51] The extreme of this theory reduces the problem in its practical application, to the formula: "Might is right." If this were the true meaning, it would justify the exploits of every usurper or invader who, by the use of superior physical force, tries to reduce his victims to obedience. On the other hand, the law of the invaded territory, lacking superior power for its enforcement, would thus become non-existent.

There is no doubt that authority cannot exist without being obeyed. However, obedience is first of all a matter of reason and of will. The "force" required by law, is, therefore, the acknowledging of the reasonableness of law, and the will to obey lawful authority. A law must be reasonable to make the conscience respond with the will to obey it. The obeying of nonsensical laws, the "Kadavergehorsam," is certainly no free man's obligation. The force of reason is the true force of law. This internal force is an essential element of law. External or physical force, on the other hand, is only a supplementary means. Its genuine purpose is directed to safeguard the law from being violated, and to protect the law-abiding citizen in his lawful interests. Physical force, therefore, is an auxiliary and defensive means of authority, but no essential element of law. It is a secondary means also for it is no substitute for justice in the latter's task to protect the member of a society, but can only serve as the executive "arm of justice."

As a society directed toward the fulfillment of supernatural ends, the Church has no need for employing physical force as an indispensable means of enforcing her law. However, the Law of the Church, as a law of conscience, contains the element of internal force to the highest possible degree, far exceeding that of any other perfect society. The exclusion from the reception of the sacraments, or the denial of certain other

[51] Saegmueller, *op. cit.*, p. 3; Ford, "The Fundamentals of Holmes' Juristic Philosophy"—*Fordham Law Review*, XI (1942), 255 sq.

or even all spiritual rights are more important and powerful means of force in an ecclesiastical organization than any degree of physical force. Thus, also with regard to force, the Law of the Church is truly law.

The sources of the Law of the Church are also natural and supernatural. The Divine Law is given by the Divine Lawgiver.[52] The purely ecclesiastical law has its supreme source in the supreme legislator of the Church, the Sovereign Pontiff.[53] His competence comprises the entire Church, while the subordinate legislators, in the first place the bishops,[54] have a limited legislative power. The limitation is material as well as territorial. The Pope is truly sovereign. In acting as lawgiver he is not restricted by any human provisions. He is not bound to consult advisors, or to submit his laws to the approval of any assembly. He is free to determine the form of legislation and legislative acts.[55] He interprets authentically the law of the Church, amends or repeals the law and grants dispensations from it.

The legislative power of the Pope as well as of the bishops derives from the Divine foundation of the Church. In fact, this constitutional authority of the Pope and the bishops is established by Divine Law. It cannot be restricted by any human authority. It has to be kept in mind, however, that, in spite of the Divine character of these offices, the laws enacted by their incumbents are purely ecclesiastical law. The legislative power of the Pope and bishops is ordinary and direct. The bishops' authority though established by virtue of

[52] Ploechl, "Das Legitimitaetsproblem und das kanonische Recht"—*ibid.*, p. 44.

[53] Can. 218; Motry, "The connotative value of the 'Sacred Canons'—THE JURIST, I (1941), 50 sq.

[54] Conc. Vaticanum, sess. IV, c. 3; Ploechl, "Das Legitimitaetsproblem ...." —*ibid.*, p. 45.

[55] Koestler, "Aufbau ..."—*ibid.*, pp. 480 sq.; Schmidt, *The Principles of Authentic Interpretation in Canon 17 of the Code of Canon Law*, The Catholic University of America, Canon Law Studies, n. 141 (Washington, D. C., 1941), pp. 10 sqq.

the Divine constitution of the Church, exists by the side of and in subordination to the Papal authority.

All the other legislative organs of the Church, like various councils and synods, as well as agencies of administration, are of purely ecclesiastical origin.[56] In fact the latter are not original lawgivers, for their authority derives from and is limited by the genuine legislators of the Church. Notwithstanding these constitutional restrictions of legislative authority, the participation of the subordinate organs of lawgiving is of greatest importance for the development of Canon Law. While the effective confirmation of Canon Law is restricted to those who have the authority by virtue of the Divine Law, the actual participation in lawmaking embraces a considerably greater number of ecclesiastical officers,[57] thus providing the Church with facilities no state or civil authority can supply.

However, while the making of the written law remains, generally speaking, a prerogative of the clergy in its Divine and ecclesiastical institution, the unwritten law, the customary law, embraces also the laity as participants in its formation. The Code has strict norms concerning custom.[58] According to the Code, the following essential requirements are needed to make a custom become law: the consent of the competent ecclesiastical superior,[59] a community which is capable of receiving at least an ecclesiastical law,[60] reasonableness, and lawful prescription by a continuous and uninterrupted usage of forty years.[61] Custom can even prevail, under certain circumstances over the written law.[62]

[56] Ploechl, "Das Legitimitaetsproblem . . ."—*ibid.*, p. 45.

[57] CIC, Titulus VII and Titulus VIII.

[58] Can. 25 sq.; Cicognani, *op. cit.*, 639 sq.; Guilfoyle, *Custom*, The Catholic University of America, Canon Law Studies, n. 105 (Washington, D. C., 1937); Trummer, *Die Gewohnheit als kirchliche Rechtsquelle* (1932); Koestler, "Consuetudo legitime praescripta"—*Zeitschrift der Savigny-Stiftung*, kanonistische Abteilung, VIII (1918); Koestler, "Aufbau . . ."—*ibid.*, p. 484.

[59] Can. 25.

[60] Can. 26; cf. Koestler, "Aufbau . . ."—*ibid.*, p. 484.

[61] Can. 27, § 1.

[62] Ploechl, "Das Legitimitaetsproblem . . ."—*ibid.*, p. 45.

Since the recognition of custom as an ecclesiastical law depends on the authority of the competent legislator, it receives its legal power from the same source as the written law. However, the cradle of this law is different: it is the practice followed by the community. Such a community is not necessarily restricted to the clergy. Any community "capable at least of receiving an ecclesiastical law",[63] comprising clergy and laity, can participate in this practice constitutive of law. This extensive recognition of custom as a creative factor of Canon Law makes, in fact, every Catholic a participant in the legislative activities of the Church.[64] It is not a right like the civil franchise, effective by plebiscite or through the election of representatives to a lawgiving body. It is quite different. It is no "individual right" of the Catholic as a member of the Church. It is rather an innate capacity of the faithful which becomes effective through their active participation in the juridical activity of a community. It is an immediate and direct participation in the lawmaking of the Church, for only the practising Catholic actually takes part in this operation. It is, on the other hand, no individual act of the single member, but a common observance of a community.[65] To make this customary observance eventually law the consent of the lawgiver is necessary. Thus the authority of customary law does not rest with the faithful or the community. It is the consent of the legislator which transforms custom into law. However, the provisions of the Code as to custom enable the faithful to influence legislation in a very important way. It is the law of the living Church in the exact sense of the word.

History teaches us that there have been tendencies, time and again, to measure the principles of Church government in terms applied to secular authority, or to introduce prin-

63 *E.g.*, a diocese, a province, or the whole church in a given nation.

64 Cf. Saegmueller, *op. cit.*, p. 166.

65 It is, however, not a practice, "followed by the greater part of the community" as Clarke (*op. cit.*, p. 248), suggests in accordance with the *Catholic Encyclopedia* (cf. "Law, Canon"). Custom is *not* a majority problem.

ciples underlying temporary currents of civil government into the sacred constitution of the Church.[66] The Church has been not seldom subject to severe trials whence she has emerged every time only to be even more strongly entrenched in her fundamental principles. The Church's government cannot be measured by criterions alien to her system. The Church is neither monarchic nor republican, neither authoritarian nor democratic. The government of the Church is ecclesiastical, based on a Divine constitution. The Church is no civil society. Every attempt, therefore, to "secularize" her by trying to eliminate supernatural principles and to replace them by principles exclusively appropriate to secular authority, inevitably leads to a misunderstanding of her innermost principles.

This is the case also with her legislation. Indeed, it is true of the ecclesiastical power of jurisdiction in general. There is no separation of the so-called three branches of government, the legislative, executive and judiciary branches of the government. The Pope is the sovereign lawgiver for the Church, the chief executive, and the supreme justice. The same is true of the bishops in their subordinate fields. The entire executive administration and the courts of the Church are no independent agencies, but they function by virtue of authority bestowed upon them by the Pope or the competent bishop.

By what means is this power protected against abuse and excess? The Church holds that law is a part of the moral order in general. Thus the law is inseparably connected with moral principles. The trend of legal positivism to "purify" law by extracting all "extra-legal scorias," like moral principles, in order to make the "pure law" an amoral law cannot invade the field of Canon Law.[67]

[66] Cf. Saegmueller, *op. cit.*, pp. 507 sq.; Roesser, *op. cit.*, p. 25; Ganahl, *Studien zur Geschichte des kirchlichen Verfassungsrechts im 10. und 11. Jahrhundert* (1935).

[67] Very well analyzed by Koestler, "Aufbau . . ."—*ibid.*, p. 479; cf. also Koestler, "Kirchliche Verwaltungsgerichtsbarkeit?"—*Zeitschrift fuer Oeffentliches Recht*, XVIII (1938), 451-452.

In recognizing moral norms as an inseparable element of itself, Canon Law is fortified by an unimpeachable quality of justice. As Canon Law must be harmoniously subordinate to the instructions of the positive Divine Law, and in conformity with Natural Law, it is securely removed from arbitrary despotism and the dogmas of Catholic faith provide the supreme maxims of the law of the Church. Dogma, moral order, positive Divine instruction, and Natural Law: these are the unchangeable limits of the law of the Church regarding justice, validity and legitimacy.[68] In other words, there can be no Canon Law outside this orbit of fundamentals.

These principal limitations, however, constitute also the sublime protection of man's natural rights. The Church has no "Bill of Rights" whose protection depends on human means only. The legal order of the Church is guarded by Christ Himself, the invisible and eternal King, the Divine Lawgiver of mankind.

As far as the Church's power and law are supernatural, they are eternal and unchangeable. Inasmuch as they are entrusted to human beings, the execution and administration is obviously subject to human weakness also. The perfection of the Church concerns only the means, but not men as the intermediary instruments. For this reason, the Church is particularly careful to avoid an unjust and illegal application of her law. In order to carry out this task she has enshrined in her system several other principles and means.

There is first of all the principle of legitimacy.[69] The power of order and the power of jurisdiction are so closely connected that the commissioning with a particular jurisdictional office is preconditioned, principally and generally speaking,[70] by rightful ordination of the candidate. It is possible that ordi-

[68] Ploechl, "Das Legitimitaetsproblem . . . ."—*op. cit.*, pp. 43, 49-50.

[69] Cf. Ploechl, "Das Legitimitaetsproblem . . . ."—*ibid.*, pp. 44 sq.

[70] Exceptions remain outside the orbit of this analysis of *principles*, e.g., the "ius circa sacra," claimed by and conceded to the secular authority or agreements in concordats; cf. Haring, *Grundzuege*, I, 54 sq.

nation or consecration should be conferred without a subsequent bestowing of jurisdictional power,[71] but no jurisdictional power can be given to one who lacks the necessary power of order, if the latter is an indispensable and fundamental requisite.[72] On the other hand, nobody can validly and lawfully bestow the power of order upon a candidate, unless he himself is rightfully consecrated, and unless both he and the candidate meet the requirements of the law. The principle of legitimacy finds its most complete expression in the Apostolic succession of the Catholic hierarchy. It is the fulness of the legitimacy of the power of order, and, therefore, of the juridical power. It was Adolf von Harnack, the outstanding Protestant scholar of the past century, who exactly described this prerogative when he said that "the uninterrupted legal order guarantees the legitimacy and uniqueness of the Church. If it is a concessum that there can be only one Church of Christ, then only that can be the legitimate one, which possesses the uninterrupted legal order. As only the Roman-Catholic Church has it, she is the one." [73]

Fait-accompli and usurpation are no sources of authority or power in Canon Law. This has to be said of the powers both of order and of jurisdiction.[74] Invalid ordinations remain invalid, and no prescription of time has any effect on them.[75] The Code of Canon Law is an abundant source of provisions for the convalidation and re-adjustment of acts which lack the necessary completeness of legitimacy.[75] It also contains the necessary norms regarding the violation of this principle.[76]

[71] *E.g., episcopus titularis*, can. 348, § 1.

[72] *E.g., sacramentum poenitentiae*, can. 871, and can. 872.

[73] Harnack, *Entstehung und Entwicklung der Kirchenverfassung und des Kirchenrechtes* (1910), p. 126; cf. can. 219.

[74] Ploechl, "Das Legitimitaetsproblem . . . ."—*ibid.*, pp. 51 sq.; Roelker, "The Effect and Obligation of Invalidating Laws"—THE JURIST, III (1943), 550 sq.

[75] Ploechl—*ibid.*, pp. 61 sq.

[76] Graf, *Die Leges irritantes und inhabilitantes im Codex Iuris Canonici* (1936); Hilling, "Die fehlerhafte Rechtshandlung und ihre Heilung"—*Archiv*

Although the law of the Church is the most complete one considering the principle of legitimacy, it is, in spite of this strictness, by no means a pitiless and inhuman law, based on coldest formalism. It is, in fact, a just and charitable law. One of the most effective means for the fulfillment of this aim is the dispensation. It is, in the law's own words,[77] " a relaxation of the law in a particular case: it can be granted by the legislator, by his successor in office, by a superior legislator and by a person delegated by the foregoing." The motive of a dispensation must be just and reasonable.[78] Dispensation from Divine or Natural Law is impossible on the same ground that no Church Law can trespass these limits. The purpose of dispensation is to maintain equity and justice. It is a particular means of jurisdiction, placed in the hands of the legislator, in order to enable him to overcome inequity or injustice which otherwise would arise from the strict application of the law. Every law expressed in human terms is incomplete and cannot envisage every possible case requiring the application of equal justice. The possibility of relaxation, therefore, does not mean that the lawgiver is allowed to apply the law arbitrarily. On the contrary, it is intended to serve a principle, so dear to Canon Law: Equal Justice under Law.

Thus dispensation is a means of justice and equity. We refer, in defining the purpose of equity in Canon Law, to Wohlhaupter, who said: " The administration of the aequitas canonica is the method of making the ideal law [79] felt besides and beyond the positive law." [80] The positive human law is a just and reasonable law only inasmuch as it is truly based on Natural Law, intended to determine principles of the latter to

f. Katholisches Kirchenrecht, CVII (1927), 3 sq., 12 sq.; Eichmann, " Actus Legitimi "—*Archiv f. Katholisches Kirchenrecht,* XVI (1936); Ploechl, *ibid.,* p. 52; Roelker, " The Interpretation of Invalidating Laws "—THE JURIST, III (1943), 364 sq.

[77] Can. 80.

[78] Can. 84, § 1; Michiels, *Normae Generales Iuris Codicis,* II (1929), 498 sq.

[79] *I.e.,* Natural law.

[80] Wohlhaupter, *Aequitas canonica* (1931), p. 190.

a more definite purpose. While the legislator thus controls the harmony between the "ideal" law and the positive law in many particular cases brought to his attention, by administering equity through dispensations, there are still cases left where the decision rests on "the individual conscience (as a last resort, and where there is not enlightenment by authority)."[81] In these cases, where the individual conscience becomes the only and last instance of equity, the Catholic is free to decide according to *epicheia*. *Epicheia*, a principle of Canon Law, is the assumption, based on natural equity, that a particular provision of law does not bind, in a singular case, for special reasons.[82] What was said of the purpose and the limits of dispensation, applies also to *epicheia*: it has to serve to make the Natural Law felt besides and beyond the positive human law, but it cannot be used against Natural Law.

Since it is a maxim that Natural Law and positive Divine Law constitute the basic law of Canon Law, we have also to investigate[83] to what extent fundamental personal rights[84] find their expression and anchor in the Code of the Church. We have to keep in mind, however, that the Code is mainly concerned with man in his relations to the social organism of the Church, and that thus sanctions provided by the Code for

[81] Clarke, *op. cit.*, p. 248[6].

[82] Ploechl, *ibid.*, pp. 58 sq. (about the right of resistance in Canon Law, cf. pp. 60 sq.); Haring, "Die Lehre von der Epikie"—*Theologisch-praktische Quartalschrift*, LII (1899), 579 sq., 796 sq.; cf. also Haring, "Epikie"—*Buchberger Lexikon fuer Theologie und Kirche*, III (1931), 722.

[83] This investigation is, of course, restricted to outlines and principles.

[84] Cf. Pius XII, Christmas Broadcast to the whole world, December 24, 1942 (translation in: Koenig, *op. cit.*, pp. 789 sq.) where the Pope defines the following "fundamental personal rights" (cf. Koenig, *op. cit.*, no. 1846, p. 800): "The right to maintain and develop one's corporal, intellectual and moral life and especially the right to religious formation and education; the right to worship God in private and public and to carry on religious works of charity; the right to marry and to achieve the aim of married life; the right to conjugal and domestic society; the right to work, as the indispensable means toward the maintenance of family life; the right to free choice of a state of life, and hence, too, of the priesthood or religious life; the right to the use of material goods, in keeping with his duties and social limitations."

the violator of these fundamental rights may differ from those provided by the secular authority. More, the Church, though respecting the State's secular competence and power to safeguard and protect man's personal rights in the orbit of the natural society, is anxious to place the violator, convicted by the State of certain crimes, also under the sanctions of Canon Law.[85]

The right to maintain and develop one's physical being is an unquestionably natural right of man. It is violated by the physical destruction of human life, or by the injuring or the mutilating the human body. The Code, therefore, condemns abortion,[86] suicide, [87] homicide,[88] conjugicide,[89] duelling,[90] all grave mutilations or injuries inflicted on the body,[91] and various sex crimes.[92]

The Code acts similarly against the violation or the injuring of man's moral life in order to protect the moral integrity, the reputation and the honor of the members of the Church society. This concern reaches not only direct offenses against the honor and good name,[93] but the Code is also anxious in prescribing norms to prevent any unnecessary publicity which could cause undue injury to man's reputation.[94] This is particularly observed in the provisions of matrimonial law,[95] and

[85] *E.g.* Can. 2354, § 1, can. 2356, § 1, § 2, "legitime damnatus"; or civil bigamy, cf. can. 2356: "etsi tantum civile."

[86] Can. 2350, § 1.

[87] Can. 2350, §2.

[88] Can. 2354, § 1.

[89] Can. 1075, 2 °, 3 °.

[90] Can. 2351, can. 1240, § 1, 4 °, can. 1399, 8 °.

[91] Can. 2354, § 1; cf. Roberti, "Respectus sociales in Codice iuris canonici" —*Apollinaris,* X (1937), 356; he includes here sterilization.

[92] Can. 2354,§ 1, § 2.

[93] Can. 2355, can. 1938, § 1, § 2.

[94] Can. 1757, § 3, 2°; can. 855; can. 1755, § 2, 1°; cf. Roberti, *ibid.*, p. 368.

[95] Can. 1031, § 1, 1 ° and § 2; can. 1045 § 3; can. 1047.

of the law of judicial procedure.[96] On the other hand, legal infamy (*infamia iuris*) constitutes a penalty,[97] and loss of reputation (*infamia facti*) causes certain juridical effects.[98] However, even here Canon Law sets certain limits in order not to deprive the *infamis* of the supernatural means of the Church.[99]

The right to develop one's intellectual life, and the right to religious formation and education are also incorporated into the norms of the Code. The religious, moral, physical and civil education of the children is a most serious obligation of the parents,[100] imposed by Natural Law. Particular emphasis is placed by the Code upon the Catholic education of the children, even if one of the parents does not belong to the Catholic Church.[101] The same obligation is imposed also on those who take the place of parents, or are otherwise responsible for the education of the children.[102] In order to safeguard the education of the Catholic faithful according to the religious and philosophical principles of the Church, the right of the latter to establish and maintain Catholic schools and institutes of higher learning, is not only asserted by the Code,[103] but the latter also urges Catholics to stay away from non-Catholic, neutral or mixed schools,[104] if these institutes should endanger adequate Catholic education. The obligation to watch over

[96] Can. 1623, § 1 and § 3; can. 1863, § 4; can. 1933, § 1; can. 2191, § 2; can. 1943; can. 1343, § 1; can. 1755, § 2, 2°; can. 1823, § 1.

[97] Can. 2291, 4°; can. 2293.

[98] Can. 2294, § 2.

[99] Can. 2232, § 1; can. 2254; can. 2290, § 1.

[100] Can. 1113; can. 1106; can. 542, 2°; cf. Roberti, *ibid.*, p. 357.

[101] Can. 1132.

[102] Can. 1372, § 2; can. 860; can. 797; can. 769.

[103] Can. 1375 sq.; Pius XI, Encyclical "*Rappresentanti in terra,*" December 31, 1929—*A.A.S.*, XXI (1929). This encyclical is usually known as "*Divini Illius Magistri*"; however, the Latin text is a translation from the original Italian; cf. Koenig, *op. cit.*, p. 388 [119]; here also the translation in the English, pp. 388 sq.; Haring, *Grundzuege*, II, 359.

[104] Can. 1374.

Catholic education in general is imposed by the Code on bishops and pastors.[105] The problem of education is an example of a *res mixta,* where the interests of Church and State require harmonious collaboration in the protection of the natural right of man to develop his intellectual life.[106]

There are certain natural rights which are usually referred to as categories of freedom.[107] However, freedom, strictly speaking, is a good which is safeguarded by certain personal rights. Freedom in a society is both a personal good of the individual member, and a common good of society. Since the social organism, as well as the individual, are bound by justice to render what is due each, justice must also rule the norms of freedom. Nobody is free to invade the legitimate sphere of his neighbor or of society. Thus, these limitations constitute also the limits of freedom. They impose, therefore, also obligations. Freedom, therefore, is not only a right, but also responsibility.[108]

To what extent are the principal freedom rights embodied in Canon Law? Since they are natural rights, they must find their place also in the Law of the Church.

Religious freedom is considered the highest ranking among these rights. It might seem like a contradiction to speak of religious freedom in the Church. Religious freedom is, according to Catholic teaching,[109] "the right to the worship of God in private and public and to carry on religious works of charity." By asserting this right the Church also avers that no civil society has the right to violate it.[110] The Church could

[105] Can. 1374, can. 1381, § 1; Roberti, *ibid.,* p. 358.

[106] By way of concordats, state legislation, etc.; cf. Haring, *Grundzuege,* II, 345, 361; Haring, *Kommentar zum Neuen Oesterreichischen Konkordat* (1934), pp. 33 sq.

[107] *E.g.* President Roosevelt's "Four Freedoms."

[108] Cardinal Seredi, "Human Freedom in Canon Law," broadcast of Radio Vaticana, recorded by: *The Sword of the Spirit,* no. 54, February 4, 1943, p. 3 (no other reference available).

[109] Cf. Pius XII, Christmas broadcast, *supra,* footnote 84.

[110] Ploechl, "Jefferson,"—*ibid.,* pp. 210-211.

not fulfill her task to preach the Gospel to all the peoples, if there were no natural right—and also a natural obligation—innate in every man to worship God. "And she respects human liberty, which is a fundamental prescription of the natural and divine law, when she legislates: 'Ad amplexendam fidem Catholicam nemo invitus cogatur'." [111] The adult cannot receive baptism, unless he manifests his intention to become a Catholic in a conscious and free act, expressing his awareness of what he is asking for.[112] Children of non-Catholic parentage below the age of discrimination, may not be baptized without the consent of their parents or those having them in charge except in mortal danger.[113] Although the Church considers every truly baptized person, be he an apostate, a heretic or a schismatic, as being subject to her law,[114] it is generally speaking, not urged upon him.

The fact that the Catholic is bound to obey the laws of the Church is, on the other hand, by no means contrary to the principle of the right to worship God. No society at all, neither Church nor State, can exist without its laws being obeyed by its members. No citizen can choose which laws he desires to obey and which he intends to neglect as not suiting him. But while we usually concede this to the State and decline to accept anarchism as a social principle, there are many who think the Church "intolerant" for binding her members to her law. However, it is not only law, it is faith, as well as the supernatural means and end of the Church, which bring upon Catholics the obligation to worship God accordingly. Man is created with free will. He is free to act. He is "free" to reject grace. He is "free" to commit a sin or a crime. However, in doing this he is acting against the law of reason.

[111] Cicognani, *Addresses and Sermons*, II (1942), 10; can. 1351.

[112] Can. 752, § 1; can. 745, § 2, 2°.

[113] Can. 750, § 1; cf. also can. 752, § 2 and § 3, can. 754.

[114] Can. 87, can. 2314, § 1 and § 2, can 12: cf. McCloskey, *op. cit.*, pp. 105 sq.

[115] Cf. Roberti, *ibid.*, p. 362.

He is, in fact, destroying the truest principle of freedom. "The Church insists firmly that we recognize that the law of reason, proceeding, as it does from nature, is truly the voice of the God of nature, which He has often further defined. But the Church is careful to avoid force and unjust restrictions on human liberty. Nothing is dearer to the Church than liberty, for herself and for others. Her discipline on this matter is set forth clearly in the Code of Canon Law." [116]

Considering the right to worship God in its threefold relation to Church, State and man, to the Church it means the right to enlighten men in the true way of worship without applying compulsion or force, and to be free in the fulfillment of this supernatural and natural task from outside interference, be it directed against the Church as such, or against her faithful members; to the State it means the obligation to safeguard this right of all citizens, regardless of their individual belief, as long as it does not turn to anarchy under religious pretext and "break out into overt acts against peace and good order;" [117] and to man it means to be free and protected as a citizen in this personal right, and thus to be enabled to fulfill his duty toward God as a faithful member of the Church.[118]

A right, closely related to religious freedom, is that of freedom of conscience, the liberty of man to obey and fulfill God's Commandments,[119] in contradistinction to that "liberty of conscience which is an equivocal expression too often distorted to mean the absolute independence of conscience, which is absurd in a soul created and redeemed by God . . . ." [120] The

[116] Cicognani, *Addresses*, p. 10.

[117] Preamble, act of religious freedom, Virginia Code, title 4, ch. 6, § 32; cf. Ploechl, "Jefferson . . . ."—*ibid.*, p. 210.

[118] Roelker, "The Citizen of the State . . ."—*ibid.*, pp. 337 sq.

[119] Leo XIII, Encyclical "*Libertas praestantium*" (on human liberty), June 20, 1888—*A.S.S.*, XX (1888), 597 sq.; cf. Koenig, *op. cit.*, pp. 40 sq. (no. 89 sq.).

[120] Pius XI, Encyclical "*Non abbiamo bisogno*," June 29, 1931—*A.A.S.*, XXIII (1931), 286 sq.; for English translation cf. Koenig, *op. cit.*, p. 447 (no. 1051).

sphere of conscience is internal. Since the Church is empowered through the sacrament of penance to redeem sins, her jurisdiction reaches into the sphere of conscience. The right to receive the spiritual benefit of this sacrament is contained principally and implicitly in can. 682.[121] The Code takes pains, however, in supplying ample provisions to exclude any restraint of conscience of the faithful.[122] This field of jurisdiction extending to the conscience, completely alien to any other legal order, is in fact one of the most precious treasures of the Church. Only the Catholic will understand our full meaning when we say that the power and jurisdiction granted for the redemption of sins constitutes sublime protection for man's right of freedom of conscience.

Man's right " to free choice of a state of life, and hence, too, of the priesthood or religious life," [123] is another natural freedom right, enshrined in the Code. Besides the right of every one of the faithful to choose any profession in a secular state of life, provided it is not directed against his obligations as a Catholic,[124] the Church offers two peculiar vocations within her own sphere, namely the priesthood and the religious life. Vocation to the priesthood is restricted to men. Only the baptized male can validly receive ordination.[125] The vocation to the religious life, on the other hand, can be chosen by any qualified Catholic of either sex.[126] The high demands in personal and moral qualifications required by both the clerical and religious life are expressed in the Code. These norms are enacted not only to bar the access of unqualified persons to

[121] Cf. *supra*, pp. 74 sq.

[122] Can. 905; can. 521, § 1 and § 2; can. 520, § 1; can. 522, can. 523; can. 566, § 2, 1 °, 4 °; can. 1361, § 1; can. 883, § 1 and § 2; can. 899, § 2 and § 3; can. 900, 1 ° and 2 °; can. 882; can. 884; can. 2252; can. 889; can. 890; can. 891; can. 258, § 1; cf. also Roberti, *op. cit.*, pp. 363-365.

[123] Cf. Pius XII, Christmas broadcast, *supra*, footnote 84.

[124] Can. 1325, § 1.

[125] Can. 968, § 1; cf. Haring, *Grundzuege*, I, 134, 135.

[126] Can. 538.

these vocations,[127] but also to prevent error, coercion, fraud or deceptive persuasion from influencing the free decision of the candidates and the superiors.[128] These precautinary norms are more precisely specified with regard to women than with regard to men desiring to enter religious life.[129]

Another group of personal rights comprises the fundamental family rights.[130] The family is the cardinal human society based on Natural Law. It is not a perfect society like the Church or the State, for it lacks the authority and power conferred upon them. However, the cardinal norms governing family life are not subject to change by human law. Marriage is one of the seven sacraments of the Church. The sacramental character of Catholic marriage is inseparable from its contractual basis.[131] Sacrament and contract are one in Canon Law. Since the spiritual (sacramental) and legal elements constitute such an inseparable unity, the Code is particularly careful in providing norms to procure the legitimacy and validity of this contract. The consent must come from both contracting partners.[132] It must be manifested in the legitimate form prescribed by law,[133] and the partners must be conscious of the objects, aims and obligations of the contract.[134] The partners must also be free in their decision, that is to say, free with regard to the expression of their will,[135] and free from impediments which might void the contract.[136] Impediments

127 Can. 1352; can. 1353; can. 973, § 3; can. 544.

128 Can. 214, § 1; can. 2352; can. 542, 1°; can. 572, § 1, 4°.

129 Can. 552, § 2; cf. Roberti, *op. cit*, p. 360.

130 Cf. Pius XII, Christmas broadcast, *supra*, footnote 84; Jemolo, "Le idee sociali nel C. J. C."—*Il Dirrito Ecclesiastico*, XLVIII (1937), 425-435; Andrieu-Guitrancourt, *Les principes sociaux du Droit Canonique contemporain* (1939)

131 Can. 1012, § 2.

132 Can. 1081, § 1 and § 2.

133 Can. 1094 sq.

134 Can. 1082, § 1; can. 1086, § 2; can. 1083; can. 1092.

135 Can. 1087, § 1 and § 2.

136 Can. 1035; can. 1036; cf. can. 1058 sq., can. 1067 sq.; can. 1038, § 1.

constituted by Divine or Natural Law cannot be overruled by human ecclesiastical legislation; and if they exist in a particular case, no valid marriage contract, and, therefore, no marriage at all can be concluded. Other defects, deriving from ecclesiastical norms or from the lack of a true consent can be corrected by convalidation or sanation according to the norms of the Code.[137]

Since the continuation of mankind is the principal purpose of marriage,[138] the Code also provides norms governing the offspring of legitimate wedlock,[139] while it protects the natural rights of even illegitimate offspring.[140]

The valid sacramental *matrimonium ratum et consummatum* is indissoluble by virtue of Divine Law.[141]

The right to the use of material goods in keeping with man's duties and social limitations, and the right to earn the indispensable means toward the maintenance of life [142] are also enshrined in the Law of the Church. Although the Code is evidently more concerned with Church property, the fundamental principle of private property, as a cardinal norm of Natural Law, is clearly recognized.[143] In the same way it is recognized that no property right may be used in excess to the detriment of the legitimate rights of others.[144]

[137] Can. 1133 sq.; can. 1138 sq.; cf. Brennan, *The simple convalidation of marriage,* The Catholic University of America Canon Law Studies, n. 102 (Washington, D. C., 1938), and Harrigan, *The radical sanation of invalid marriages,* The Catholic University of America Canon Law Studies, n. 116 (Washington, D. C., 1938).

[138] Can. 1013, § 1.

[139] Can. 1114; 1115; § 1 and § 2.

[140] Can. 777 § 2; can. 1116; can. 1117; cf. McDevitt, *Legitimacy and Legitimation,* The Catholic University of America Canon Law Studies, n. 138 (Washington, D. C., 1941).

[141] Can. 1118.

[142] Cf. Pius XII, Christmas broadcast, *supra,* footnote 84.

[143] Can. 1499, § 1.

[144] Can. 1923, § 1.

As to the indispensable means toward the maintenance of life, the Code not only contains the necessary legal provisions, based on the general principles of Natural Law, to procure adequate means of living for the clergy [145] and for those who have chosen religious life,[146] but it also reflects in an outstanding way the social principles of the Natural Law,[147] binding society at large as well as all its members. Every employer, particularly the clergy, the members of religious orders and societies, and administrators of ecclesiastical property are bound by law [148] to pay honest and just wages, to provide decent quarters, not to withdraw their employes by any contract from the care of their families because of parsimony, or to impose any work beyond the physical capacity of the employes, or unfit for them because of age or sex. The concept of just compensation for services rendered is also stressed in the processual law of the Code.[149] Eventually, by prescribing rest and an interruption of work on Sundays and the feast days of the Church, the Code links care for the physical welfare of man with his spiritual needs, and his obligation to render to Christ, the King, what is His.[150]

Thus, the principles of social justice and of man's personal rights are enshrined as inalienable fundamentals in the Code of Canon Law.

This analysis of the principles of the Law of the Church were incomplete without a rendering of due merit to that ethical and legal fundamental ideal which fills this law with the fullness of humanity. It is true, the Law of the Church is strict in its unchangeable Divine and Natural principles. But it is also the law of charity. It is ruled by charity. This is

[145] Can. 979, § 2; can. 981, §§ 1-2; can. 982, §§ 1-3; can. 1438; cf. Roberti, *op. cit.*, pp. 371-372.

[146] Can. 496; can. 549; cf. Roberti, *op. cit.*, pp. 372-373.

[147] Cf. the monograph of Andrieu-Guitrancourt, *loc. cit.*, for a thorough analysis of the problem.

[148] Can. 1524.

[149] Can. 1787, § 1; can. 1805.

[150] Can. 1247, § 1; can. 1248.

not only the charity which takes care of the poor, a virtue emphasized particularly in the Code.[151] It is more than that: it is the sublime norm, guiding the spirit of the Code in its every phase. It is the basic principle of distributive justice, the supreme criterion of every aspect of the Law of the Church.

Charity is also the basis of good faith, the legal virtue of every true law. *Bona fides* is unthinkable without true charity. *Bona fides* in Canon Law is not only the law of fairness, it is an eminent legal maxim, governing the conduct and interests of the subjects of this law,[152] the violation of which is condemned and abhorred by the Code.[153]

The Law of the Church is a law in a very definite sphere, aiming at a very distinct end, different from and alien to Secular Law. It is a law with a supernatural purpose, namely the sanctification of man.

It is ecclesiastical law. However, it is no exclusive law, closed up behind the doors of churches, or the gates of religious communities. It is a living law, embracing Catholics throughout the world with no frontiers and barriers but the eternal and unchangeable limits of Divine and Natural law.

And although the present Code of Canon Law has passed only a quarter of a century of existence, the Law of the Church and its principles recall a history as old as her foundation. Secular Law and Canon Law have influenced each other as long as our civilization has proudly claimed to be rooted in Christian maxims. These mutual relations belong to our heritage. Not always and at all times have these relations been flourishing or without decline. There is no doubt that the once almost integrated position of Canon Law in the British Legal order has lost much of its importance.[154] No doubt

[151] Can. 467, § 1; can. 468, § 1; can. 469; can. 1473; can. 1475, § 2; can. 2184; can. 537; can. 1535.

[152] Can. 105, 3°; can. 1027; can. 1746; can. 1743, § 1; can. 1015, § 4; can. 1446; can. 1512.

[153] Can. 40; can. 45; can. 1054; can. 52; can. 48, § 2; can. 98, § 1; can. 1743, § 3; can. 1731, 3°.

[154] Clarke, *op. cit.*, p. 264; Kinnane, *A First Book of Anglo-American Law* (1932), pp. 270-271.

either that the first American settlers of Anglo-Saxon stock were rather inclined to stimulate the emancipation of the Common Law from its connections with Canon Law.[155] However, this heritage still exists, and through the principle of the right of religious freedom it finds its best and finest recognition in the American way of life. Indeed, they are united in a much deeper sense, and on an unperishable basis: on the unchangeable and eternal order of Natural Law. It is that order on which the Founding Fathers built the fundamental rights of this nation.

In today's crisis, more than ever before, the promulgation of these fundamental laws is our common task; yes, a task, for it does not suffice to recognize them as a source of rights and obligations. When Pius X, the father of the present Code of Canon Law, took the first step toward this monumental work, on March 19, 1904, with the promulgation of his famous Motu proprio "*Arduum sane*," [156] he entrusted it with the sacred mission he had chosen for his pontificate: "Omnia instaurare in Christo." [157] Never could Canon Law have been described in a better way than by dedicating it to such a majestic task. The restoration in Christ means the restoration of the Natural Order,[158] an order, based on the fundamental Code of Moral and Natural Law.[159] In the quest for this order

[155] Clarke, *op. cit.*, p. 265.

[156] *A.S.S.*, XXXVI (1903-1904), pp. 549 sq.

[157] *Ephes.* i. 10.

[158] Pius XII, Encyclical "*Summi Pontificatus*" (on the function of the State in the modern world) October 20, 1939—*A.A.S.*, XXXI (1939), p. 555 (official English text); cf. also Koenig, *op. cit.*, pp. 592 sq.

[159] "Declaration on World Peace" (144 prominent leaders of the Catholic, Protestant and Jewish faith in the U. S. A.), October 6, 1943 (*New York Times*, October 7, 1943); cf. also Wright, "The Moral Bases of International Law"—*Proceedings of the 35th Annual Meeting of the American Society of International Law* (1941), pp. 52 sq. Cf. also the profound and remarkable "Joint Statement" on Christian principles and social order, issued by Mgr. Gilroy, Archbishop of Sydney, and Dr. Mowll, the Anglican Archbishop of Australia, in June 1943, published in *English Catholic Newsletter*, no. 207, October 30, 1943, pp. 2-4.

the Code of Canon Law is truly "a Light to the Nations."[160] It is a shrine of those precious principles we all are fighting for, namely the preservation of "peace on earth among men of good will,"[161] in times to come.

To the lawyer the promulgation and advancement of the principles of this Natural Order are today's particular and most urgent task. We think sometimes of that unique privilege, once given to a lawyer. It is the most sublime counsel on the principles of Divine and Natural Law a jurist ever received, and an answer which holds the clue also to the lawyer's task in our days:

"And one of them, a doctor of the law, . . . asked him, 'master, which is the great commandment in the Law?' Jesus said to him, 'Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole mind.' This is the greatest and the first commandment. And the second is like it, 'Thou shalt love thy neighbor as thy self.'

"On these two commandments depend the whole Law and the Prophets."[162]

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[160] Griffiths, "A Light to the Nations"—The Jurist, III (1943), 354.

[161] *Luke*, ii, 14.

[162] *Matthew* xxii, 35-40.

THE ORIGIN AND DEVELOPMENT OF THE TERM "TITLE"

I. Introduction

The study of the origin of the term *titulus* and its gradual development in the usage and laws of the Church is concerned with a canonical concept which had its beginning in the early centuries of the Catholic Church. Indeed, it dates back to Apostolic times. However, the origin of the term *titulus* is obscured by the mists of tradition. When, in the early years of the Church, the term appears, it is in such a context that it seems to tell us clearly that its origin is far older than any written records.[1] When the word first appears, it appears as a term designating an institute which was in existence and well-known. We thus grant its use before its adoption by the Church (and it was a wide usage). When next it appears, it has already been incorporated into the ecclesiastical language of the Church. Thus its canonical origin is but a matter of explanation, supported, of course, by reliable sources.

Church buildings, as we know them, did not exist in the first two centuries of the Church, when her activities were limited and often interrupted by the fierce persecutions which greeted the infant Church. And yet the Church functioned as a society during this time. Of necessity, therefore, the problem of the juristic personality of the Church in the Roman Empire presents itself. Many opinions are put forward to explain the

[1] Stannard, *Rome and Her Monuments* (New York, 1924), p. 282: ". . . the titular organization was believed to be older than any written record. That the belief is well founded may be inferred from the fact that no credible tradition survives as to the origin of the term *titulus*. Explanations given are no more than an acknowledgment of the difficulty presented by the word *titulus*."

fact of Church ownership of property during this time.[2] Roman Law acknowledged only such collegiate moral persons as subjects of its law as were given public recognition either by the Senate (*Senatus Consultum*) or by the Emperor. We shall not here consider the various opinions which attempt to explain the discrepancy between the implications of this rule and the fact of the persecutions; but in spite of the latter, we must admit that some juridical form existed then which allowed the Church a certain amount of freedom. Between the persecutions, the Church may have had an unstable juridical status, depending upon the authorities of the Empire. It must have been an inferior grade of personality that could be, and was, easily suppressed by the authorities during times of persecutions. That the Church could carry on at all during this time seems due mostly to the generosity of the faithful rather than to a juridical personality granted to the Church.

Be that as it may, the Church had her own buildings in Rome during these times[3] And as the numbers of the Christians increased during the third century, it obviously became impossible for the whole community to meet and to receive the Eucharist at the same place, as had been the practice, and it became necessary to establish local centers of worship. Their establishment marks the beginning of the formal organization of Christian worship, and the general use of the term *titulus* in this organization.

Our main authority is the *Liber Pontificalis*, a series of biographical particulars of the Popes, which was continued

[2] De Rossi, *Roma Sotteranea Christiana* I (Rome. 1864), p. 104; Duchesne, *Les Origines du Culte Chrétien* (Paris, 1909), p. 85. Goodwine, *The Right of the Church to Acquire Property* (The Catholic University of America Canon Law Studies, n. 131, Washington, D. C., 1941), pp. 59, 85.

[3] Schnorr von Carolsfeld, *Geschichte der juristischen Person* (Muenchen, 1933). Krüger, *Die Rechtstellung der Vorkonstantinischen Kirchen* (Stuttgart, 1935). Many examples of this may be cited, *v.g.*, Aurelian, emperor in 272, in the matter of a property dispute on which the Christians of Antioch were divided, "ordered the building to be given to those to whom the rulers of the Christian religion in Italy and the bishop of Rome should write"—Eusebius, *HE*, VII, XXX. Cf. also Edict of Gallienus (261)—Maurret-Thompson, *History of the Catholic Church* (New York, 1929), I, p. 532.

for centuries after its first compilation. It seems safe to say that this compilation was begun under Boniface II (530-532), undoubtedly by several persons, from official documents which were preserved in the pontifical library and from the archives of the Church which went back to an early date.[4] It follows that while there is a presumption in favor of the statements of the *Liber Pontificalis* as to events occurring after the peace of Constantine, when the Church was left free to organize itself publicly, there is no such presumption as to its assertions concerning the first three centuries. A critical scrutiny of the latter is demanded, one which must become more and more severe as the narrative moves back towards Apostolic times.

The *Liber Pontificalis* states that after the peace the Church in Rome was organized around local centers of worship; that these centers numbered twenty-five in the beginning of the fourth century; that they were called *tituli*; and that most of them were founded by early fourth-century Popes. The question naturally arises whether this system was new, a departure from or a return to the old arrangement disturbed by the fierce persecution of Diocletian. More probably it was but a return to a system previously used. It is stated in the *Liber Pontificalis* that Pope Marcellus (304-309) established twenty-five *tituli* in Rome, as "dioceses",[5] to serve as centers for the baptism of the many converts from paganism, for the reception of Penance, and for the burial of martyrs.[6] Marcellus was elected Pope in the year 304 (308?). During his pontificate, though the persecution continued, it had lost much of its strength, and it was possible

[4] L. Duchesne, *Le Liber Pontificalis, texte, introduction et commentaire* (2 vols., Paris, 1886-92), I, xxxvi ff.

[5] The term *dioecesis* was synonymous with the term *paroecia* in the early centuries. The two terms were used indiscriminately for bishoprics and smaller districts involving pastoral functions.

[6] "Hic rogavit quandam matronam nomine Priscillam et fecit coemeteria Via Salaria, et XXV titulos in urbe Roma constituit, quasi Dioeceses, propter baptismum et poenitentiam multorum, qui convertebantur ex paganis et propter sepulturas martyrum."—*Liber Pontificalis*, I, 164.

to set about the work of reorganization. But it was in the highest degree unlikely that Marcellus, with a renewal of the persecution seriously threatened, should begin a new scheme of organization in the city of Rome. His natural policy would be to restore as well as he could under the circumstances the old system which the persecutions had destroyed. His date falls so shortly before the peace of Constantine that, had he inaugurated a new policy, a very clear recollection of his work and actions would have survived to be included in her written archives which the Church began to maintain as soon as the day of safety came.[7] That the latter are silent on this matter is significant. Moreover, the number of twenty-five given by the *Liber Pontificalis* is not correct. Archeological evidence shows that this number was reached in the course of the fifth century while only eighteen *tituli* were of pre-Constantine origin.[7a]

However, the *Liber Pontificalis* itself carries the establishment of the *tituli* back not merely to the decade before the peace, but far beyond, as will be seen in the consideration of the origin and development of the term *titulus*.

II. Origin of the Term

The word *titulus* comes, according to Festus,[8] an ancient classical writer, from *tutulus* (from *tueri* or *tegere*). Thus soldiers of Rome who protected the homeland were called *tituli*, from which the proper name Titus arose. According to Varro,[9] another ancient writer, the term was used to denote the higher portions of a city, the *arx* or citadel, which protected the city against attack. From this use another arose:

[7] Kirsch, *Die römischen Titelkirchen in Altertum* (Paderborn, 1918), pp. 3, 149, 134 ff. Duchesne, "Les titres presbytéraux"—*Mélanges d'archéologie et d'histoire*, VII (1887), 17 ff.

[7a] Kirsch, pp. 117 ff.

[8] Sextus Pomponius Festus, *De Verborum Significatione* (Lipsiae, 1913), XVIII, 41.

[9] Varro, *De Lingua Latina* (Loeb Classics, Cambridge, Mass.-London, 1938), VII, 44.

the roof of a house was referred to as a *titulus* and the goddess to whom the house was dedicated was given the name Tutelina.[10] Scaliger, however, derives the term from τίω in the sense of *honorare* (not in the sense of *punire* or *vindicare*) because honor and value are ascribed to things because of their title.[11]

In the Bible, the term *matsera*[12] is used, which is translated in the Vulgate by the word *totulus,* to indicate a rack or altar. However, there seems to be no connection between the Hebrew term and *titulus* as used in the early Christianity, although some authors maintain this. There was no translation of the Pentateuch at the date of the establishment of titles and therefore it cannot be claimed or assumed that the στήλη of the Septuagint would be translated at that time by the *titulus* of the Vulgate. Buonocore cites Diodorus Siculus as referring to a "title of polished stone" erected as an altar in honor of the god, Osimondus.[13] Among the Romans it was the custom to place a stone, called a *titulus* to mark the confines of property.[14] On this stone was marked the name of the owner or his sign. This name or sign upon the stone or upon an inscription or tablet on a house was an expression of ownership by law.[15] This title was called *titulus fiscalis* when used by the emperors to designate imperial property.[16] Of a similar

[10] Buonocore, *Il Titulus Canonicus* (Naples, 1933), I, 38.

[11] Scaliger, *De Re Poetica* (Rome, 1898), I, 9.

[12] *Genesis,* xxviii, 17, 18; *Leviticus,* xxvi, 1.

[13] Buonocore, *op. cit.,* p. 38.

[14] Gothofredus, *Commentaria in Cod. Theodos.,* II, 14: "Jus fuisse moremque privato titulum suo fundo de suo nomine imponere quo testaretur se Dominus ejus praedii esse" (ed. Lipsiae, 1736, vol. I, 178). Also Baronius, *Annales ecclesiastici,* ad an. 112, n. 5.

[15] Hinschius, *Kirchenrecht* (Berlin, 1867-1897), vol. I, p. 63; also c. 1, C. XVI, q. 6.

[16] "Tituli namque impositione rem aliquam sibi fiscus solitus erat vindicare, atque principi consecrare; ut cum ait imperator: 'Tituli vero, quorum abjectione praedia nostra sunt consecranda substantiis, nonnisi publica testificatione proponantur'"—Baronius, *Annales,* ad. an. 112, n. 5.

nature were the veils or *vela cortina,* titles of the emperors inscribed with the picture and the name of the emperor, as a sign of possession. The name *vela cortina* or *vela cortinas regias* is mentioned by St. Ambrose in a letter to Marcellus with this meaning.[17]

The Romans also used the word *titulus* to designate a small tablet or inscription which was hung upon the neck or placed above the head of those criminals condemned to death, indicating the crime for which they were punished.[18] It was such a title which was placed above the head of Christ on the cross: the title of "Rex Judaeorum" in three languages, Aramaic, Greek and Latin, stating the cause and reason for the death penalty.[19] For the martyrs who followed Christ, whose only crime was "quod Christiani essent," the title with the reason of punishment was the one word "Christianus."[20] The poet Prudentius commemorates the eighteen martyrs of Saragossa in these words:

> Bis novem noster populus sub uno
> Martyrum servat cinera sepulcro
> Hunc novum nostrae titulum fruendum
> Caesaraugustae dedit ipsi Christus
> Juge viventis domus ut dicata,
> Martyris esset.[21]

These then were the various uses of the word *titulus* when the Church incorporated that word into her own official language.

[17] St. Ambrose, *Epist.* XX.

[18] Suetonius (*De Vita Caesarum,* Domitian, X), tells of this use.

[19] *John,* xix, 19, 20; *Matt.,* xxvii, 37; *Mark,* xv, 26.

[20] Tertullian, *Apologia,* cap. 2, n. 18.

[21] Prudentius, *Opera Omnia* (Rome, 1824), *Peristephanon,* Hymn IV. Also cf. Hymn V in honor of St. Vincent the Martyr.

III. "Titulus" as Used by the Church

The first mention of this term as used in the Church occurs in the *Liber Pontificalis,* in its story of the life of Pope St. Evaristus (112-121):

> Evaristus, natione Graecus, ex patre Judaeo, nomine Juda, de civitate Bethleem, sedit annos tredecim, menses sex, dies duos, fuit autem temporibus Domitiani et Nervae Traiani a consulatu Valentis et Veteris usque ad Gallum et Braduam Consules. Martyrio coronatur. Hic titulos in Urbe Roma divisit Presbyteris et VII Diaconos constituit, qui custodirent Episcopum praedicantem propter stylum veritatis. Hic fecit ordinationes tres per mensem Decembris, Presbyteros VI, Diaconos II, Episcopos per diversa loca V, qui etiam sepultus est juxta corpus B. Petri in Vaticanum VI Kal. Novembris, et cessavit Episcopatus dies nondecim.[22]

Evaristus according to the Liber Pontificalis divided the titles among his priests. Just what were these titles which he divided? In other words, just how was the term *titulus* adopted by the Church? There are many explanations given. Baronius, with others, maintains that the term was borrowed from the *titulus fiscalis.* Just as the emperor identified his property and possessions with his title, so the early Christians identified their places of worship with a distinct *titulus,* a cross placed above the building, a glorious emblem of the religion of Christ. Thus the building dedicated to the service of God, or the house or room consecrated to liturgical worship, was marked with the title of the cross, similar to the signs or titles by which the treasury officials marked property that was reserved to the service of the emperor.[23] Mabillon [24] and Thom-

[22] Duchesne, *Liber Pont.,* I, 126.

[23] Baronius, *Annales,* ad. an. 112, nn. 4, 5, 6. Also Mourret-Thompson, *History of the Catholic Church,* I, p. 208.

[24] *Museum Italicum* (Paris, 1724), Commentarium II, c. 3, pp. xiii ff: "Jam vero basilicae illae, quae suos quaeque presbyteros habebant, titulares haud dubie erant. Nam tituli nihil aliud sunt, quam basilicae, quibus certi sacerdotes ac ministri adscripti et addicti habentur."

assinus [25] assert that the *tituli* were basilicas to the service of which one or more priests were assigned. Binius [26] states that *titulus* designated a house or home consecrated to divine worship ("domos divino cultui mancipatas").

The hypothesis of Baronius, although it may apply to the churches of Christianity in later centuries, does not seem to fit the facts as we know them. The Roman law did not recognize the society of Christians; indeed the Church was persecuted almost constantly during her early years. During the pontificate of Evaristus, a persecution raged, under Trajan, perhaps less violent than others before but long-lived. A cross, placed where everyone could see it, as a title, would be an invitation to the persecutors, who were sent to arrest those who "represented and adored the Cross, the symbol of the new Faith." [27]

The explanation of Mabillon and Thomassinus undoubtedly is accurate but only if it be understood to refer to a period much later than the time of Evaristus.

More in line with historical tradition is the hypothesis of Binius, developed later by Kirsch [28] and Buonocore.[29] In the beginning the Christians held their meetings and services in the rooms of private homes, a remnant of the Hebrew custom of holding meetings in the upper part of private homes. Of such a character were the Cenacle of Jerusalem and the places of reunion in Rome mentioned in the Acts of the Apostles.[30] For this reason these chapels or oratories were called "ecclesiae domesticae." St. Paul mentions those in Corinth and in Rome,[31] the latter in the home of Prisca and Aquila where St. Peter stayed when in Rome and which was the center of his

[25] *Vetera et Nova Ecclesiae Disciplina,* I, 2.

[26] Mansi, *Conciliorum Amplissima Collectio,* tom. I, 238.

[27] Thomassinus, *op. cit.,* I, 2.

[28] *Die römischen Titelkirchen in Altertum* (Paderborn, 1918), *in toto.*

[29] *Il Titulus Canonicus, in toto.*

[30] *Acts,* i, 13; x, 9; xx, 8; xviii, 2, 3.

[31] *I Cor.* xvi, 19; *Rom.* xvi, 3-5.

apostolic labors. Most of these private houses were offered by Roman patricians converted to Christianity. Among these, according to tradition, was the home of the rich senator, Pudens,[32] in which St. Peter lived and baptized and where he offered "the Body and Blood of Christ for the living and the dead" on an altar of wood.[33] Likewise the houses of Lucina, Eudoxia, and Pammochius were all "ecclesiae domesticae" given over to the church for her services.[34] These were private houses; and we have no proof that they were actually given to the Church at this time. It seems that one or more of the rooms of the house were fitted for liturgical services. An altar was erected before which the Christians gathered to listen to the reading of the Scriptures,[35] sang hymns and psalms,[36] received the Holy Eucharist which the bishop sent to them by deacons and acolytes, and prayed for those who had died "fidelis in Domino."[37]

As has been shown, *titulus* was used by the Romans to denote an inscription of some sort, which, when placed over a building or on one's property, denoted possession. Thus the private homes of Romans were inscribed. The name of the builder or the owner was placed over the entrance of the large private residences, simply as a claim of ownership.[38] It was this title or inscription which was considered proof of right of possession. Thus the word *titulus* in common usage, meant "the house of . . . ." The private homes, therefore, wherein

[32] De Rossi has confirmed this tradition with his investigations.

[33] Marucchi, *Eléments d'archéologie chrétienne* (Paris, 1905), p. 38; Duchesne, *Les Origines du culte chrétien*, p. 85.

[34] Martigny, article "Titre," in *Dictionnaire des antiquités chrétiennes.*

[35] Philo, who lived in the first century of the Christian era, speaks of an oratory of Terapeutis as a little sacred chapel in a house, called a Semno or monastery which "was used not for eating or drinking or any other purpose, but exclusively for praying and the reading and examination of the Scriptures."—Philo, *Opera Omnia* (ed. Hallop, London, 1930), II, 46. Also Eusebius, *HE*, II, 17.

[36] *Ephes.* v, 19; *Coloss.*, iii, 16.

[37] *Constitutiones Apostolorum*, VI, 30.

[38] Hinschius, *Kirchenrecht*, I, p. 63; Kirsch, *Titelkirchen*, p. 127.

the Christians held their services were known by their titles: "titulus Pudentis," "titulus Caeciliae."[39] Buonocore seems to think that *titulus* in the minds of the early Christians of the time of Evaristus meant rather the altars erected in these private homes or in the cemeteries or catacombs. One need not object to this interpretation, for it may be seen how easily the word *titulus* which meant the private home in which an altar was erected could, in the minds of the Christians, come naturally to mean the altar itself. However, of necessity, this would constitute a definite development in the meaning of the term, which in its original meaning designated ownership. As to the altars erected in the catacombs being known as *tituli* during he time of Evaristus, there is no proof whatsoever. Of course, there were small family sepulchral chambers in the catacombs, in reality small churches or subterranean oratories where Mass was occasionally celebrated,[40] and the Christians may have referred to the altars there as *tituli* but of this there is no proof. Later, when the term became identified with the word "church," these underground chapels may have been referred to as titles just as the churches built above them were so called.

These were the titles which Evaristus is said to have divided among his priests. But the statements of the *Liber Pontificalis* as to the number of titles in these early times must not be taken too literally. Thus, when we read that Pope Cletus (81-?) "ex praecepto Beati Petri XXV presbyteros ordinavit in urbe Roma,"[41] or that Pope Urban (223-7) made offerings of twenty-five church-plates,[42] or that Marcellus reorganized

[39] Kirsch, *op. cit.*, p. 3 ff.

[40] Armellini, *Lezioni di archeologia* (Rome, 1898), p. 211; "il cubiculum cimiteriale deve considerarsi come una vera chiesetta, come un piccolo oratorio sotterraneo ove si celebrava la funebre liturgia e il sacrificio eucaristico, e dove si tenevano dai fideli adunanze più o meno solemni per gli offici di pietà ai defunti."

[41] Duchesne, *op. cit.*, I, 122.

[42] *Liber Pontificalis*: "Hic fecit ministeria sacrata omnia argentea et patenas, argentas XXV posuit"—Duchesne, I, 143.

the 25 titles in the city of Rome, it is obvious that the compiler of the *Liber Pontificalis* simply dates back the fully developed organization of his own time (sixth century) to the early centuries.[43]

As time went on, that part of the building reserved for worship took on a special character. The other parts of the building came gradually to be detached, and participated in no respect in its sacred character. The *domus ecclesiae* became the *domus Dei,* the place where Christians met the Lord—the *dominicum.*[44] These houses of God date from the beginning of the third century, when they seem to have been given to the Church,[45] and it was then that the word *titulus* began to be used in the sense of "church" when referred to these houses of God; for now such houses which became the property of the community, retained the names of their owners or builders who had donated them, and became known as "titulus Pudentis, Caeciliae, Anastasiae," not as private homes, but as churches.[46]

With the increase of the faithful during the third century[47] it became necessary to appoint one or more priests, together with lower clergy, especially lectors and acolytes, to these churches to serve the people there and in the surrounding quarters.[48] These titles were still known by the name of the previous founder or owner; the designation of a Saint was not

[43] Kirsch, *op. cit.* pp. 117 ff.; Duchesne, "Les titres presbytéraux," (cf. *supra,* n. 7).

[44] Duchesne, *Origines du culte chrétien,* c. XII, p. 1; also de Rossi, *Bullettino d'arch. crist.,* 1856, p. 38-53.

[45] Kirsch, *op. cit.,* p. 127.

[46] Kirsch, *op. cit.,* p. 127.

[47] According to a letter of Pope Cornelius to Bishop Fabian of Antioch, in the year 250 there were in Rome 46 priests, 7 deacons, 7 subdeacons, 42 acolytes, 52 exorcists, lectors and ostiarii, over 1,500 widows and others needing help.—Eusebius, *HE,* VI, XLIII, 11-12. Harnack has concluded from this that there were scarcely less than 30,000 members.—Fuchs, *Der Ordinationstitel,* (Bonn, 1930), p. 7.

[48] Kirsch, *op. cit.,* p. 176; Phillips, *Kirchenrecht* I, (Ratisbonne, 1845), p. 605.

used at this time. This is the beginning of the relationship, which was to become ever stronger, between a cleric and the title to which he was attached and from which he obtained his sustenance.

During this time the priests who served in the various titles continued to care for the cemeteries near by. The union of the cemeteries and churches in the city, begun during the pontificate of Pope Dionysius (261),[49] was becoming closer and closer, and it seems fairly certain that the churches built over the tombs of martyrs during the various periods of peace were in some way dependent upon the priests of the city's churches. This dependence was to increase during the next century.[50]

The persecution of Decius and Valerian began in the year 258. We do not know whether these titles were confiscated along with the cemeteries. Buonocore states that they certainly were destroyed, and later reerected by Pope Dionysius (261-272) under Gallienus and Maxentius.[51] However, we are certain that these titles were destroyed or confiscated under Diocletian in the year 304, because Eusebius and Lactantius both tell of Gallienus' edict of toleration and peace in the year 311, in which he permits " that they may be Christians again, and that they may restore their houses in which they were accustomed to assemble," [52] Moreover, Eusebius relates that Constantine restored to the Christian community their places of reunion and whatever pertained to their cemeteries.[53] Pope Marcellus, as we have seen, during a lull in the fierce violence of the persecution of Diocletian, reorganized the old system

[49] *Liber Pontificalis:* " Dionysius . . . presbyteris ecclesias divisit et coemeteria et parochias, Dioceses instituit."—Duchesne, I, 122.

[50] Leclercq (article " Catacombe " in the *Dict. d'archéol. chrét.*): after the edict of Galerius, cemeteries and titles were divided among the priests at the same time that parish lines were delineated, to the number of 25. From that time forward the catacombs were served, not by a special clergy, but by the parish clergy, each title being responsible for one or more cemeteries.

[51] Buonocore, *Il Titulus Canonicus,* p. 44; Eusebius, *HE,* VII, 13.

[52] Eusebius, *HE,* VIII, 17; Lactantius, *Death of the Persecutors* (edited by Mallon, London, 1902), p. 33.

[53] Eusebius, *HE,* X, 5.

which was destroyed and reconstructed the titles in the city of Rome "as dioceses." This expression, referring to the ecclesiastical organization which the sixth century editor of the note in the *Liber Pontificalis* had before his eyes, should again not be taken too literally. There were no real parishes at that time; in the fourth century the words *dioecesis* and *paroecia* were elastic and meant any portion of territory subject to an administrator. It is not improbable that Marcellus, while awaiting the restitution of the churches confiscated, organized or reorganized worship in the temporary buildings which the Christians were then using for their meetings.[54]

The edict of toleration by Constantine and Licinius in 313 brought to the Church the long awaited peace. Now she was given freedom, equality of rights and a definite juristic personality. Of course, this rescript was not put into effect in its entirety until later; but with the peace Christian churches arose and basilicas were built in the city of Rome, outside the city over the tombs of the martyrs, and in other parts of the Roman empire. And at this time the glorious emblem of Christianity, the cross, was placed, perhaps in the sense of the old *titulus fiscalis,* above the entrances to all these churches.[55] The hypothesis of Baronius of the origin of the term *titulus* seems to apply here and not to the time to which he ascribes it. For during this time, the cross was the sign, or, as he prefers to call it, the *titulus* of a church of Christ; during this time it may be said "quod titulo crucis censeretur res dicatae esse religioni." [56]

In this, the fourth century, the title churches continued to function and now the term "title" or "title church" distinguished these churches; it became the technical term for those churches which furnished fixed residences for the clergy at-

[54] Hefele-Leclerq, *Histoire des conciles* (Paris, 1907-1923), II, 22, note; Mourret-Thompson, *History of the Catholic Church,* I, p. 468; Kirsch, *op. cit., passim.*

[55] St. Ambrose: "Domum salutat; tam enim devota fuisse videtur, ut omnis domus ejus signo titulata esset crucis"—*In Epist. ad Coloss.,* c. 4 *in fine.*

[56] Baronius, *Annales,* ad annum 112, n. 7.

tached to them, in contradistinction to the other churches of Rome which did not furnish permanent residences or assignments for the clergy.[57] Now for the first time these presbyteral title churches were definitely distinguished; the *tituli presbyterales* as a definite organization took shape. New title churches were erected during this time (e.g., "Titulus S. Marci" erected by Pope Mark [336-341] in honor of the Evangelist) [57a] always with this distinction in mind: that title churches furnished a steady commission with fixed residence for the clergy. Previous to this, the titles were the churches of Rome; now they become distinct churches, distinguished from the rest. The number of these title churches at this time is not certain. It seems that there were 25 by the middle of the fifth century, and this number was not increased until much later. It is during this period that the theory of Mabillon seems to hold. For then, and not previously, was it true that "basilicae illae, quae suos quaeque presbyteros habebant titulares haud dubie erant. Nam tituli nihil aliud sunt, quam basilicae, quibus certi sacerdotes ac ministri adscripti et addicti habentur." [58]

Each title had its own regularly organized clergy, for these titles were the permanent centers of ecclesiastical functions for the Roman presbyters. The members of the college of presbyters of the Roman community were divided under these titles; in the fourth century, since they became identified with the title to which they were assigned, they began to add to their names the name of the title to which they belonged: "N ... presbyter tituli N ...." There are lists of the signatures of the priests of the titles recorded in the acts of the Synod held in Rome in 499 under Pope Symmachus and also in the Roman Synod of Gregory the Great in 595. In these lists, it may be noted that sometimes as many as four priests are assigned to one title. Only five of these titles carry the name of Saint.

[57] Kirsch, *op. cit.*, p. 137.

[57a] Kirsch, *op. cit.*, pp. 6, 41, 45, 58, 68, 77, 84, 87.

[58] Mabillon, *Musaeum Italicum*, Commentarium, p. xiii.

There is another interesting fact to be noticed: that the name of some titles derived from a thing rather than a person. There is the "Titulus Fasciolae" mentioned in the Synod of 499 and also in an inscription to a "lector tituli fasciolae" who died in the year 377, discovered by De Rossi.[59] The name *fasciola* seems to have been due to a tradition that upon the Via Nuova, a bandage (*fascia*) fell from St. Peter's wounded foot as he fled from the Mamertine prison. The bandage was found by a pious matron who later erected a church upon the site. This is related in the Acts of SS. Processus and Martinianus which are of the fifth century. Later this *titulus* was changed to "Titulus SS. Nerei and Achillis," when their relics were kept there. Then there was the "Titulus Marci" mentioned in both lists which was previously known as "Titulus Pallacinae" from the street on which it stood. It is so styled in an inscription to a lector of the church of the year 348.[60]

As has been noted, more than one priest was appointed to a particular title and these were all titularies of that church. These in turn were aided by the lower clergy attached to these titles, who lived in edifices connected with the church and were called *mansionarii*. These presbyters of the twenty-five titles, with the help of the lower clergy attached thereto, continued to serve the people of Rome. To these presbyters of the different titles was entrusted a corresponding section of the Roman community. In other words, the presbyters did the pastoral or parish work in the Roman diocese; they aided the Pope in administering parochial work in his own diocese. They had no share whatsoever, at this time, in the government of the Universal Church.

This was the beginning of a parochial arrangement in the Church; and in this the diocese of Rome was quite distinct and an exception to the usual arrangement in dioceses of the Church, where there were no divisions into parishes, but rather a centralistic government centering about the cathedral. It

[59] De Rossi, *Inscriptiones Christianae*, I (Rome, 1857), 831.

[60] DeRossi, *op. cit.*, I, 62.

is true that these twenty-five titles were not regularly used for the celebration of Mass [61] but rather, as in their original foundation by Marcellus, as oratories permanently destined for the administration of Baptism and Penance, and as centers of all the functions which the presbyters, deacons and lower clergy were expected to perform among the people of Rome. Mass, at this time, was celebrated in the five major basilicas of Rome. The twenty-five first priests (*presbyteri priores*) of the twenty-five titles were divided into five groups of five each and these would celebrate Mass, in turn, in these five basilicas. These major basilicas were in no sense parishes; but the presbyteral titles were, in the sense that they had definite fixed limits, whereas the basilicas were not limited to any particular section of the Roman community.[62] These priests, who were attached to the titles or parochial churches and who were at the same time incardinated into the five major basilicas, were called " cardinals " of these basilicas.[63] They were priests or presbyters inasmuch as they exercised their presbyteral duties in the various titles, and cardinals inasmuch as they were incardinated into the major basilicas.[64] These were the cardinal priests, who, together with the cardinal deacons and cardinal bishops, began, in the eleventh century to assist the Pope in the government of the Universal Church.[65]

[61] Mabillon, *op. cit.*, XVI, 54; Kirsch, *op. cit.*, p. 136, 179 ff.; Stutz, in *ZRG, Kan. Abt.*, IX (1919), 301 ff.

[62] Mabillon, *op. cit.*, XII: " Patriarchales (ecclesiae) . . . definitum populum non habebant, sed omnium censebantur. Tituli habebant dioeceses seu parochias sibi praefixas ac definitas."

[63] Klewitz, " Die Entstehung des Kardinalskollegiums "—*ZRG, Kan. Abt.*, XXV (1936), 147 ff.

[64] Buonocore, *ibid.*, p. 44.

[65] In the eleventh century, however, there were twenty-eight cardinal priests, seven priests assigned to each of four major basilicas and attached to the then existing twenty-eight titles; St. John Lateran was given over to seven bishops incardinated into that basilica after Pope Stephen III (*Liber Pontificalis*, I, 478)—later reduced to six. See Klewitz, *op. cit.*, pp. 127 ff., 151 ff.

IV. "Titulus" in the Sense of Church in General

It was during this time, at the end of the fourth century and at the beginning of the fifth century, that the term *titulus* was used in Rome in the sense of a church in general. Thus we find this term applied to other churches than the original twenty-five. Innocent I (401-417) in his letter *Ad Decentium* calls the churches of Rome titles: "De fermento vero, quod, die dominica, per titulos mittimus." [66] In the subscriptions of the Synod of Rome in 499 there are twenty-nine titles listed, which list does not mention the titular basilicas of St. Sylvester, St. Susanna, St. Xystus, St. Balbina, SS. Marcellinus and Peter, and the Four Crowned Martyrs, the priests of which were witnesses at the Roman Council under Gregory the Great in 595. Also omitted are the titles of SS. Prisca, Potentiana, and Mary, all of which are found in the subscriptions of another Roman Council, under Pope Zachary in 745.[67] As Mabillon argues, from this fact and from fact that Innocent I in the letter *Ad Decentium* makes a distinction between those priests "constituti ad coemeteria" and those who labored "intra civitatem" and between churches built over the tombs of the martyrs and those "quae plebem haberent," it may be assumed that titles at this time were of two kinds: major titles, the original twenty-five titles which were parochial churches, and minor titles, which were built over the tombs of martyrs.[68] The term minor title seems to be a new name given in the fifth century to the churches built over the cemeteries during the third century, which churches were taken care of by the titular clergy of the title on which the cemetery depended. Gradually, special guardians (*praepositi*), presbyters and lower clerics, were assigned to these minor titles charged with the administration of them and especially

[66] *Ep. XXV ad Decentium* (JK, n. 311, an. 416), n. 8; Migne, XX, 556.

[67] Mabillon, *op. cit.*, p. xv. For the texts of the subscriptions see the respective editions in *MGH, Auct. antiquiss.*, XII, 410; *Epp.* I, 366 f.; *Conc.* II, 44.

[68] Mabillon, *ibid.*, p. xvi.

the care "ad luminaria sepulchorum martyrum" dependent, of course, on the titular clergy. This distinction between major and minor titles is not quite clear in the sources. The explanation seems to be that Innocent I sent the *fermentum* only to presbyters of churches "quae plebem haberent"—i.e. to the real titles (which Mabillon calls major titles), not to the presbyters "constituti ad coemeteria"—i.e. those in charge of cemeterial churches, which, although they had a distinct clergy, still depended on the titles. But after the sixth century, these *praepositi* freed themselves step by step of the authority of the titularies, and the churches of the catacombs acquired a certain autonomy.[69] At this time, too, the term "saint" became attached to the names of titles. Some which were formerly named after the founder or builder, now were dedicated to saints, martyrs of the early church. Of course, the titles erected over the tombs of the martyrs were dedicated to them.[70] From Rome, the word title in the sense of a church spread into the rest of Italy and to the universal church. In Italy in the sixth century[71] and in France during the Carolingian period[72] the term *titulus* was used to designate a station-church, which depended upon a baptismal or parish

[69] For the reasons which led to an end of the original relations between the titles and the cemeteries, see Kirsch, *op. cit.*, p. 217 ff.

[70] Cf. Mabillon, p. xv, for examples.

[71] Pope Pelagius in a letter (JK, n. 976, an. 558-568) to the Bishop of Nola: "Si tanta est ecclesiae Sessulanae penuria, ut parrochia esse non possit, eam potius in titulum Nolanae ecclesiae constitue, ut . . . competentia ibidem divini cultus per deputatos cardinales ecclesiae presbyteros ministeria celebrentur."—Pöschl, *Bischofsgut und Mensa episcopalis* (Bonn 1908-9), I, 19; Kirsch, *op. cit.*, p. 143.

[72] "Aeclesiis igitur baptismalibus custodes eligantur presbyteri . . . Tituli quoque earundem ecclesiarum una cum rectoribus aeque sibi praepositis tamquam subjectionis ordine contenti sublimioris humiliter culmina venerentur" —*MGH, Cap.*, I, 369. Also Bishop Victor ". . . non amplias quam sex baptisteria et viginti quinque minores tituli" (823)—*MGH, Epp.* V, 309. Synod of Parra (850): ". . . singulis plebibus archipresbiteros praeesse volumus, qui . . . presbiterorum, qui per minores titulos habitant, vitam . . . custodiant"—*MGH., Conc.*, II, 120.

church. From this use as designating a station-church, the term was applied to churches in general.[73]

V. Ordination to a Title

We have seen that the clergy from the fourth century on were appointed to particular titles with which they became identified. At this time, too, a new practice began: that of *titulatio*. Clerics of every grade, because of these attachments to a particular title, had to be ordained for a particular church, which served as their title. This was the origin of the title of ordination, even though at the time there was no formulated law or technical term for this ordination to a particular church or title.[74]

The necessity for a stable clergy was felt early in the Church. Pope Dionysius (259-268) in a letter to Severus mentions the necessity that requires priests to remain in the church and diocese to which they were assigned.[75] In the Council of Elvira (300) [76] an irremovable clergy in each parish is mentioned.[77] But the inconsistency of many clerics in this matter (of remaining in the church where they were ordained) had led to some disorder in the Church during the first half of the fourth century. The abuse was first occasioned by the persecutions; but soon the abuse spread: clerics sought the honors generally paid to outside ecclesiastics and began to leave the church to which they had been ordained.[78] To remedy this the Fathers of the Council of Arles in 314 compelled bishops, priests and deacons to remain in the church for which they had been ordained and decided that clerics who did not so remain

[73] Council of Paris (612): "Abbatis, presbyteros vel hos qui pro titulis deserviunt"—*MGH, Conc.*, I, 188. Also Council of Neuchingen (772): abbots are not allowed to interfere in the *tituli populares* or parish churches.—*MGH, Conc.*, II, 105.

[74] Fuchs, *Der Ordinationstitel* (Bonn, 1930), p. 26; McBride, *Incardination and Excardination of Seculars* (The Catholic University of America Canon Law Studies, n. 145, Washington, D. C., 1941), pp. 66 ff., 98 ff.

[75] Mansi, I, 1006, 1007.

[76] Hefele-Leclerq, *Histoire des conciles*, I, 132 as to the date.

[77] Council of Elvira, canon 77—Mansi, I, 889.

[78] Mourret-Thompson, *History of Catholic Church*, I, p. 516.

would be deprived of the office which they had received for that church only.[79] The Council of Nicaea in 325 also presupposes as already existing the custom by which bishops, priests and deacons were not ordained except for a certain and definite church to which they were to be attached permanently. For canon 15 states:

> De civitate ad civitatem, non episcopus, non presbyter, non diaconus transferatur. Si quis autem . . . tale quid temptaverit . . . hoc factum prorsus in irritum ducatur, et restituatur ecclesiae, cui fuit episcopus, aut presbyter aut diaconus ordinatus.[80]

This custom of not ordaining bishops or priests except for a definite church was quite universal, as is evidenced by the scarcity of exceptions to this rule to be noted from the time of the Council of Nicaea to that of Chalcedon when a definite law was made on the subject. Thus St. Jerome in the year 379 was ordained by Paulinus not for any particular church, as he remained a monk.[81] In the year 393 St. Paulinus of Nola was ordained priest under condition that he remain free. In a letter to Severus he says, " Ea conditione in Barcinonensi ecclesia consecrari adductus sum, ut ipsi ecclesiae non obligarer, in sacerdotium tantum domini, non etiam in locum ecclesiae dedicatus." [82] Likewise, Macedonius, a monk, was ordained " *absolute* " or " *sine vinculo ad aliquam ecclesiam* " by Flavian, Bishop of Antioch, as Theodoretus states.[83] There are

[79] Council of Arles (314), canon 14. The question is raised by Mourret-Thompson (*ibid.*, p. 516) whether this canon merely forbade a transfer from one diocese to another, or whether it also prohibited a change of parish. But canon 77 of the Council of Elvira and legislation of other later councils would seem to indicate definitely the latter interpretation.

[80] Council of Nice, canon 15—*MPL*, LXVII, 150; also Mansi VI, 1130, for a similar version of canon 14.

[81] " Num rogavi te, ut ordinarer? Si sic presbyterum tribuis, ut monachum nobis non auferas, tu videris de judicio tuo. Sin autem, sub nomine presbyteri tollis mihi propter quod saeculum dereliqui, ego habeo quod semper habui "—*MPL*, XXIII, 343.

[82] *Epist. ad Severum*, n. 10—*MPL*, LXI, 159.

[83] Theodoretus, *Relig. historia*, c. XIII—*MPG*, LXXXII, 1402.

other examples of absolute ordinations during this time [84] but they are the exceptions to the general rule.

In the Council of Chalcedon in 451 absolute ordinations were prohibited: every cleric must be ordained for some particular church of the city or of the rural districts, or for some church built for a martyr or for exercising spiritual duties in a monastery. Canon 6 states:

> Nullum absolute ordinari debere presbyterum aut diaconum nec quemlibet in gradu ecclesiastico, nisi specialiter ecclesiae civitatis, aut possessionis (np. pagi) aut martyrii, aut monasterii, qui ordinandus est pronuntietur. Qui vero absolute ordinantur, decrevit sancta synodus irritam haberi hujusmodi manus impositionem, et numquam posse ministrari ad ordinantis injuriam.[85]

Hence priests were to be ordained not for the universal Church but for a certain definite place.

Laws similar to that of Chalcedon were repeated often in Councils in the following centuries.[86] The Council of Paris (846) in canon 52 reiterates the law of Chalcedon: "Qui vero ex nostris parochiis aut ad titulum, aut absolute ordinari petuntur, nullatenus ordinentur, nisi in clero certo et religioso, vel etiam in civitate, saltem uno anno immorentur . . . . Et nemo absolute quemquam ordinare praesumat sicut sancti sanxerunt canones."[87] Because clerics were ordained only for a particular title, they were said to be *titulati* (*praetitulati, intitulati, adtitulati*) into the title or church.[88]

[84] Many, *De Sacra Ordinatione* (Paris, 1905), p. 329.

[85] Council of Chalcedon, can. 6—*MPL*, LXVII, 172, 173; Mansi, VIII, 1226.

[86] Council of Rheims (813) can. 20: "Ut presbyteris de minore titulo ad majorem non liceat transmigrare"; Council of Tours (813) can. 14: "De titulo minori ad majorem migrare nulli presbytero licitum est; sed in eo permaneat, ad quem ordinatus est"—*MGH, Conc.*, II, 255; 288.

[87] Mansi, XIV, 831.

[88] Benedictus Levita (lib. V, cap. 28): "Nam episcopi non erant, quia nec ad quandam civitatis episcopalem sedem titulati erant." Rather of Verona (960) (*Synodica ad presbyteros—MPL*, 136, 561): "Nullus ecclesiam, ad quam titulatus est, relinquat." Also Council of Clermont (1095), can. 13—Mansi, 20, 817. Concilium Placentium (1095), can. 15: "Sanctorum canonum statutis consona sentientes decernimus, ut sine titulo facta ordinatio irrita habeatur,

With the introduction of the system of benefices for the maintenance of the clergy, the term *titulus* lost its original meaning entirely. In the early middle-ages a new system of dividing the goods of the Church began to develop under the influence of feudalism. The ancient form of maintenance of the clergy—by salary—came to an end, and the new system of supplying a distinct portion of the goods of the church as *beneficium* to an individual cleric, took its place.[88a] This benefice was assigned to a cleric for his sustenance when he was ordained to a particular church or title. The means of his support, his benefice, came to him from the title to which he was ordained. Thus it was almost inevitable that by the eleventh century this benefice would be referred to as *titulus.*

The Council of Clermont in 1095, canon 12, shows this connection: "Ut nulli clericorum liceat deinceps in duabus civitatibus duas praebendas obtinere, cum duos titulos non possit habere."[89] And there are other references to various benefices of one parochial church which were called *tituli.*[90] Thus the idea grew that the title of ordination meant the livelihood of the cleric which was a prerequisite to ordination, and a cleric was said to be ordained with a *titulus beneficii.* The III Lateran Council in the year 1179, under Alexander III further developed the law of Chalcedon. For canon 5 decrees:

> Episcopus si aliquem sine certo titulo, de quo necessaria vitae percipiat, in diaconum vel presbyterum ordinaverit, tamdiu ei necessaria subministret, donec in aliqua ecclesia ei convenientia stipendia militiae clericalis assignet; nisi talis ordinatus, de sua vel paterna hereditate, subsidium vitae possit habere.[90a]

et in qua quislibet titulatus est, in ea perpetuo perseveret. Omnino autem in duabus aliquem titulari non liceat . . ."—Mansi, XX, 806. Cf. also Many, *De Sacra Ordinatione,* p. 332.

[88a] For the feudal background of the entire institution of benefices, which was not sufficiently appreciated by the older theory of Thomassinus, see Stutz, *Geschichte des kirchlichen Benefizialwesens* (Berlin, 1895), *in toto.*

[89] Council of Clermont, canon 12—Mansi, XX, 817.

[90] C. 30 (Innocent III [1200]), X, *de jure patronatus,* III, 38.

[90a] C. 4, X, *de praebendis,* III, 5.

Of course, the Lateran Council did not intend to permit wealthy men to be ordained *sine titulo,* that is, *sine beneficio,* which would obviously be contrary to the law of Chalcedon; but rather it established a pecuniary penalty for those bishops who would ordain *sine titulo* by obliging them to furnish sustenance to those thus ordained, and excused the bishop from this penalty if the ordained cleric was able to sustain himself.

Other titles of ordination arose, all with this meaning of furnishing a livelihood for the clergy. Thus in the year 1208 Pope Innocent III permitted the ordination of a wealthy cleric to major orders *sine titulo*:

> Tuis quaestionibus respondemus, quod clericos in minoribus ordinibus constitutos, de patrimonialibus bonis habentes, unde possint congrue sustentari, etsi nondum fuerint beneficium ecclesiasticum assecuti, dummodo aliud canonicum non obsistat, ad superiores poteris ordines promovere.[91]

Thus a patrimony was considered a titulus and was called *titulus patrimonii, titulus patrimonialis,* and this title was used together with the *titulus beneficii* in the ordination of clerics to major orders. Thus in the Council of Béziers (1233) it was stated in canon 6:

> Sine titulo patrimoniali centum solidorum Turonensium ad minus, vel ecclesiastico beneficio competenti sicut in jure canonico cautum est, ordinandus de cetero nullatenus admittatur.[92]

Thus the term *titulus patrimonii* was introduced into the legal language of the Church, although in themselves these two terms are almost contradictory.

Many abuses arose because of this, because a patrimony often was not only used as a substitute for a *titulus* but also as a substitute for a divine vocation. Too, many priests ordained under the title of patrimony, had no proper church or benefice to serve, and became *presbyteri vagi* or *acephali.* These evils persisted until the Council of Trent reformed the matter.[93]

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[91] C. 23, X, *h.t.*

[92] Council of Béziers, canon 6—Mansi, 23, 271.

[93] Council of Trent, sess. XXIII, *de ref.,* c. 16; sess. XXI, *de ref.,* c. 2.

Cases and Studies

THE TEST OF CATHOLICITY UNDER CANON 1099: OBJECTIONS RESOLVED

In the October issue of The Jurist, there appeared an article entitled as above. The contention of the article was that the absence of personal acceptance of Catholicism from the age of seven, from childhood, exempted the offspring of mixed marriages or of non-Catholic marriages from the observance of the canonical form of marriage even though the offspring might have been baptized in the Catholic Church. This was advanced as the interpretation of the release accorded by canon 1099, § 2. The unanimous consent of the authors in Canon Law maintains that the reception of a Sacrament expresses true, personal acceptance of Catholicism and thus such a person after having received the Sacrament will never be released from the obligation to observe the canonical form of marriage. There is less unanimous consent but nevertheless a strong, influential group of canonists which holds that personal acceptance of Catholicism can be deduced not only from the reception of a Sacrament but also from acts of a religious nature on the part of the individual. Such acts might be: attendance at cathechism over a period of years; recitation of Catholic prayers regularly along with the conviction that one is a Catholic and belongs to the Catholic Church especially if all heretical practise is excluded, etc. In the latter cases the condition laid down by the canon 1099, § 2 is not fulfilled namely, a total lack of Catholic training from childhood and thus the individual should not be released from the obligation of the form of marriage.

A very apt question and difficulty is proposed by a discerning canonist. What if a Sacrament is received before the age of seven by a person baptized in the Catholic Church but born of non-Catholics, who, after having received the Sacrament falls away from the Church and never performs any other act of Catholic worship? Would that person be held to the Catholic form of marriage? Was there sufficient, personal acceptance of the Catholic Faith on his part?

The point of the difficulty proposed is that the Sacrament was received before the age of seven and in the above-mentioned article it was held that the canon presupposes a total lack of Catholic training from the age of seven, from childhood. It inferred a total absence of acts of Catholic worship from childhood, from the age of seven. Therefore it would seem that any act of worship performed before seven years of age would not count for Catholic training, for manifestation of personal acceptance of the Catholic faith.

The inference is not correct. All that is required for personal, Catholic training and hence personal acceptance of the Catholic Faith is that acts of Catholic worship be performed by one who enjoys the use of reason. Anyone with the use of reason may elicit an act of the will whereby he personally accepts the Catholic Faith. The use of reason is juridically presumed at the age of seven years [1] and that is the only juridical fact which led the author of the preceding article to set down seven years as the age criterion for judgment as to the sufficiency of the acts from which personal acceptance was to be judged. Ordinarily seven years of age will be required in the individual whose acts are to be taken as manifestations of Catholic training and personal acceptance of Catholicism. Chretien in his *De Matrimonio* sets down as the interpretation of "*infantili aetate*" the age of seven. Gasparri likewise insinuates the age of seven as the determining date.[2] More fundamentally, the norm for judging the value of the acts is not the age, but the fact of the use of reason in the individual performing the acts. If the use of reason is present before the age of seven, then the acts suffice as the basis for personal acceptance of the Catholic Faith. The use of reason is presumed after seven years of age but it must be proved before that date.

The norm thus proposed for the establishing of personal acceptance of the Catholic Faith, namely, the use of reason in the individual performing such acts, is a solid, canonical principle. The Code of Canon Law definitely and indelibly marks as a Catholic one who performs certain acts after attaining the use of reason. Canon 745, § 2 states that a child who has attained the use of reason is an adult insofar as baptism is concerned and that he may be baptized on his sole petition for baptism. The child is recognized

[1] Canon 88, § 3.

[2] Cf. *De Matrimonio*, (Romae, 1932), II, 143, 14.

as capable of choosing the Catholic Faith, of becoming a Catholic. Canon 906 imposes the obligation of confessing one's sins at least once a year on all those who have attained the use of reason. Canon 859 imposes the Paschal precept on all those who have attained the use of reason. Therefore the Code presumes that once a child has the use of reason, he is able personally to profess his Faith or reject it. The child by performing certain acts may make manifest his acceptance and realization of his obligation to observe the laws of the Catholic Church. All that is required in the child is the use of reason.

If we apply these principles practically, one finds that the child judged capable of receiving a Sacrament and juridically prepared for it, can not escape making the necessary act of acceptance of the Faith. The reception of the Sacrament of the Eucharist before the age of seven presupposs the use of reason in the child as well as a very adequate acceptance of the Catholic Faith, no matter at what age It is received. Let us consider the legal requisites for admission to the Sacrament for the first time. Canon 854, § 3, reads: Outside the danger of death, a more complete knowledge of Christian Doctrine and a more exacting preparation is rightly demanded; namely, such as will enable the child, according to his age and ability, to grasp, at least, the truths of Faith which are to be believed by necessity of means and to approach the Blessed Eucharist with devotion consonant with his years. The fulfillment of this canon involves the use of the personal, reasoning faculty of the child. He must accept by supernatural faith as truths divinely revealed the existence of God and the fact that God will reward the good and punish evil-doers; he must accept them through the revelation proposed by the teaching authority of the Church—usually through his catechism teacher. *In voto*, at least, he is recognizing the Church as the true Church instituted by Christ. Can one not sense the acceptance, the personal act of allegiance to the Church of Christ in that reception of the Sacrament? It was the Church who led the child to that personal act and by means of the act, the child accepted Christ and Christ's Church.

The same conclusion is justified by a consideration of the stipulated devotion to the Blessed Sacrament. The child must know the story of its institution, of the power given to the Apostles and handed down to the priests of the Catholic Church and of the exercise of that power in the Mass. What Faith is accepted when all

this is believed? None other than the Catholic Faith. The child must grasp all this in his own childish fashion and with his own power of reason. There is and there must be a personal acceptance of Catholic Faith by anyone who receives Holy Communion, no matter what his age.

What about the child who receives Holy Communion for the first time whilst in danger of death and then falls away from the Church without ever performing another act of Catholic worship? Has he made sufficient personal acceptance of his Faith so that he may be held always to the canonical form of marriage? Certainly. Canon 854, § 2 says that in order to give the Holy Eucharist to children in the danger of death, it is enough that they be able to distinguish the Body of Christ from ordinary bread, and also that they be able reverently to adore It. Here again there must be the use of reason and personal acceptance of the Faith. The child must make an act of Faith; he must believe that God sent His Son into the world and that this Son of God left His Body and Blood with us for our food and nourishment—is there not personal acceptance in such an act of Faith?

The same conditions are required for admission of the child to confession; the use of reason is presumed and must be had before the child can be admitted to the Sacrament. Once admitted, the child must profess his Faith since the power to forgive sins is proper to the priests of one Church—the true Church, the Catholic Church.

Thus one may well conclude that the valid reception of a Sacrament before the age of seven presupposes the use of reason in the child, constitutes an act of personal acceptance of one's Faith and hence excludes for all time for that person the benefit of any release from the obligation of observing the form of marriage.

Can one predicate the same obligation as deriving from the implicit, personal acceptance of one's faith as evidenced by the performance of other acts which bear upon religious practise before the age of seven? It is patent that there exists much difficulty in this respect and the difficulty comes precisely from the presumed lack of personal use of reason, indicative of choice, made manifest by means of these acts. The presumption would be against accepting such acts performed before the age of seven as manifestations of personal acceptance of one's religion. There is not enough of the reasoning person in the performance of them. In contrast to the reception of a Sacrament, these fail to denote clearly enough the pledging of allegiance, the acceptance of the Church, the reali-

zation of one's obligation to the Church. However, our conclusion in the negative must not be too rigorous. Authors cite the case of children of converts, baptized in non-Catholic sects, brought into the Catholic Church as infants with their parents. Are they excluded from the release of Canon 1099, § 2, if they fall away from the Church from childhood despite their early Catholic training? Yes, they are excluded from the release unless they reject, immediately upon coming to the age of reason, their Catholic upbringing and education given to them before the age of reason.[3] This, in spite of the fact that their education might well have consisted in that category of acts outside the reception of any Sacrament; and remark that the rejection, the contradiction is looked for at the moment that the individual attains the use of reason.

An objection has been raised to the use of acts of a religious nature performed before the age of seven years completed as the basis for a canonical obligation. It is objected that no ecclesiastical law binds a baptized person until the latter has attained the age of seven years completed. Canon 12 states this fact under one proviso: namely, the age of seven years completed is mandatory for the imposition of an obligation unless the law in question specifies otherwise or explicitly dispenses from that age. Canon 1099, § 2 does not seem to dispense from this condition and therefore no obligation, no basis of obligation is to be admitted until after the age of seven years completed and acts performed before that age should not carry with them the basis for a legal obligation later on.

To this objection, a reply seems not too difficult. Canon 1099, § 2 permits the use of acts of a religious nature performed before the age of seven as the basis for the obligation to the canonical form of marriage because it sets aside canon 12 by the words "*ab infantili aetate.*" The education in heresy, schism, or the lack of religious education must be from "*ab infantili aetate.*" What does that phrase mean? It means that period of life up to and exclusive of seven years completed. Canon 88, § 3 tells us that an "*infans*" is one who has not yet attained the age of seven years completed. Therefore, the adjective "*infantilis*" should indicate that same period of life, that same age. Therefore, acts of a religious nature before the age of seven years completed do furnish the basis for deducing exemption from or obligation to the canonical form, and this in virtue of the very words of the canon. Cappello, Marx,

[3] Gasparri, *De Matrimonio*, II, 143.

Robert, *L'Ami du Clergé* affirm this explicitly.[4] Gasparri[5] declares that in the *votum* proposed for the decree, "*Ne temere*" the exemption was to be based on the profession of heresy before the age of seven. This *votum* served for the rendition of canon 1099, § 2.

In concluding let us briefly state our position:

1—We think that Canon 1099, § 2 grants exemption to all those who were baptized in the Catholic Faith and who were born of non-Catholics but from childhood, *i.e.*, before the age of seven years, never personally accepted the Catholic Faith either because they were educated in heresy, schism, or grew up without any religion whatsoever. On the contrary, no exemption exists if the Catholic Faith was practised at that tender age and *a fortiori*, if afterwards.

2—Personal acceptance of the Catholic Faith can be brought about by performing acts of Catholic worship which involve the use of reason by the baptized person himself.

3—Personal acceptance can be brought about by implicit means, *i.e.*, by the performance of acts of a religious nature and of Catholic tone which involve the use of reason by the person himself. These acts can bind the person to the canonical form of marriage if they are of sufficient weight to justify and signify personal acceptance of the Faith. Acts which do not involve the use of reason may serve as the basis for personal acceptance of the Faith if they are not contradicted immediately by the person upon attaining the use of reason.

The above points, we venture, furnish a sound and secure basis for the application of canon 1099, § 2.

This discussion reveals the deep sources which must be studied and weighed in cases of this nature. It is not to be wondered at that a formal process will often be required to arrive at a correct decision. The more one probes this matter, the more one appreciates the attitude of the Church. Her policy is not one of mere, arbitrary releasing from an obligation; it is respect for and the acknowledgment of a juridical status or the lack of one, as established by the conscious choice of the individual.

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[4] Cappello: *De Matrimonio*, (Romae, 1933), 795; Marx, *Declaration of Nullity of Marriages Contracted Outside the Church*, The Catholic University of America Canon Law Studies, n. 182 (Washington, 1943), pp. 62, 63; Robert, *Le Mariage* (Rennes, 1937), 119; *L'Ami du Clergé* (1927), 224.

[5] Gasparri, *De Matrimonio*, II, 145.

WHENCE THE RIGHT OF THE BRIDE'S PASTOR?

It may be that others will criticize a certain point raised by Dr. Piontek in his article on Canon 1097, § 2,[1] and in such event this rebuttal may be disregarded. My purpose in writing it is merely to take care that this one point does not pass unobserved. Dr. Piontek states that the reason for the prescript "coram *sponsae* parocho" cannot be "reasonably surmised." He quotes Fr. Clifford in support of this view: "All authorities agree . . . No canonical reason actuates the choice of the bride's parish." He further quotes Fr. Clifford and also Msgr. Nevins to the effect that "the motive is regard for womanly modesty, namely, that the man seek the woman and not she the man." But Dr. Piontek, rightly, does not agree. To his own theory, however, it would seem that exception should likewise be taken: "The reason, then, why the bride's pastor is given the preference must have a deeper canonical root than merely the 'womanly modesty' as suggested by Clifford and Nevins. And this is to be sought in the requisites stressed in Canon 1097, § 1, 1°-3°, guaranteeing the absence of diriment impediments and all other defects affecting the contract. It is namely the legislator's well-founded supposition, corroborated by the facts of experience, that the bride as *a general rule* will mostly possess a domicile, quasi-domicile, or at least a month's residence, in a given parish and for this reason a proper investigation can be made in this matter by her canonical pastor *in ordine ad matrimonium.* The groom, on the other hand, in a great many instances will be a *vagus* . . ."[2]

The history of Canon Law is, unfortunately, not my forte. Too, I have not facilities at hand for quoting sources or recognized authors in this fascinating field. Indeed, I can merely repeat, pretty much from memory, what was said on the historical background of Can. 1097, § 2 by Fr. Ives A. Zeiger, S.J., in his lectures at the *Gregorian,* Rome, 1935-1936.

In his valuable but all-too-concise volume, *Historia Iuris Canonici, vol. II. De Historia Institutorum Canonicorum,*[3] Fr. Zeiger refers, in two sections *de influxu iuris populorum Germanicorum,* to

[1] THE JURIST, III (1943), 459.

[2] *Ibid.*, p. 460.

[3] Romae, 1939.

the concept of *tutela* known among the Germans as *mundium, mundiburdium, Munt.*[4] "Non solum potestas in res temporales, sed etiam in homines subditos ita intrinsecus limitata habeatur. Pater familias relate ad familiae membra, herus relate ad servos et operarios, princeps relate ad subditos non erat dominus absolutus, sed potius eorum tutor. Istius tutelae conceptus (*mundium, mundiburdium, Munt*) cardinem universi ordinis publici constituit."[5] Now according to Germanic law (and from here on, my only reference is my memory and a few scattered notes taken in class), three elements were required *ad validatatem* in marriage:

(1) Pactum de mundiburdio transferendo (sponsalitia);
(2) Contractus et tradito sponsae a mundiburdio patris in mundiburdium sponsi;
(3) Consummatio carnalis.

The *sponsalitia* of Can. 1017 represent the Church's gradual transformation of the German tribal pact which had as its parties not the nupturients but the groom, on the one hand, and the family of the bride on the other, and had as its object not a future marriage but rather the transference of the *mundiburdium* upon the payment of a price by the groom.[6] It is not necessary to dwell upon the striking amelioration of woman's juridical condition brought about by this evolution of Canon Law.

The second element mentioned above was the public element,[7] the

[4] *Op. cit.*, pp. 92, 93.

[5] *Ibid.*, p. 92.

[6] "Da einerseits der Verlobungsvertrag nicht behufs sofortiger Erfüllung geschlossen wurde, anderseits der Bräutigam, wollte er ein Anrecht auf die Braut erlangen, streng genommen das Muntgeld sofort hätte entrichten müssen, so lag hierin eine gewisse Gefahr für ihn, und, um sich hiervon zu befreien, entrichtete er bei ver Verlobung statt der ihm obliegenden Leistung (des Muntgeldes oder Wittums) das sog. Hand-, Haft- oder Draufgeld, arrha, d.h. eine Scheinleistung, die rechtlich so galt, als wenn die wirkliche Leistung erfolgt wäre, und die das Rechtsgeschäft erst fertig machte. Zum Ausdruck, dass diese Leistung seine Ansprüche noch nicht befriedige, behielt der Empfänger das Handgeld nicht, sondern gab es sofort weiter, indem er es entweder an die Armen verschenkte (Gottespfennig) oder mit den zugezogenen Zeugen in Bier oder Wein vertrank (Weinkauf). Sohm 28 ff. Bei den Franken bestand das Handgeld in einem Solidus und einem Denar, d.h. einem Goldschilling und einem Silberpfennig; dasselbe musste bezahlt werden."—Knecht, *Handbuch des Katholischen Eherechts,* p. 606, note 6.

[7] "Desiderabatur exacta distinctio inter ius publicum et ius privatum: Multae functiones publicae, quae secus auctoritati publicae solent esse reservatae,

traditio sponsae in facie Ecclesiae (often quite literally *in facie,* for a special door of the church was designated). Through fraud on the man's part this public element, the contract, was too often omitted, and since unfaithfulness was a crime only for woman (the Decretalists until the twelfth century argued the point as to whether a woman had the right to accuse the man of adultery), the quondam inferior juridical position of woman is all too evident. She was definitely the victim of social injustice. To remedy this situation the Church introduced two elements among the Germans:

a) The banns of marriage (taken from the English and French churches);

b) The ecclesiastical form of marriage. The Church, in effect, made the parish priest of the bride her guardian (tutor) so that it was he who gave the bride into the *mundiburdium* of the groom. This arrangement by which the Church assumed a sort of guardianship of the bride forms the background of legislation by the IV General Council of the Lateran: "Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando . . ." "Sane, si parochialis sacerdos tales coniunctiones prohibere contempserit . . ."; [8] and by the Council of Trent [9]: "Si quae provinciae aliis, ultra praedictas, laudabilibus consuetudinibus et caeremoniis hac in re utuntur, eas omnino retineri sancta Synodus vehementer optat." Hence the prescript of can. 1097, § 2, *coram sponsae parocho.*

The third element, the *consummatio carnalis,* need not concern us here. There are, however, interesting historical implications; *e.g.,* the various solemnities in vogue among the mediaeval Germans and the dispute between the canonists of Paris and those of Bologna, finally settled by Pope Alexander III.

May I repeat that this is not a scientific dissertation? I am relying upon my recollection of Father Zeiger's lectures and not upon authorities that I can now consult—for I have none at hand.

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apud Germanicos cum iure privato dominii intime iungebantur." — Zeiger, *op. cit.,* p. 9.

[8] C. 3, X, *de clandestina desponsatione,* IV, 3; cf. etiam c. 3, X, *de sponsa duorum,* IV, 4 (Alexander III Salemitaro Archiepiscopo).

[9] Sess. XXIV, *de ref. matrim.,* c. 1, *praesertim.*

CANON 829 DOES NOT MODIFY THE GIFT ON CONDITION PRECEDENT OF A MASS STIPEND

In canon law the risk of loss of a Mass stipend is always on the priest-donee of the Mass stipend. The priest must say the Mass or have the Mass said by another priest once the Mass stipend has been accepted by him. The priest is not excused from saying and applying the Mass even though the loss of the Mass stipend was occasioned through no fault of his own. Canon 829 reads:

> "Licet sine culpa illius qui onere celebrandi gravatur, missarum eleemosynae jam perceptae perierint, obligatio non cessat."

Freely translated into English:

> "If the Mass stipends once accepted are lost, though without fault of him who has the duty to say the Masses, the obligation does not cease." [1]

There is no canon in the Code expressly authorizing a priest to take title to a Mass stipend merely by an *inter vivos* delivery by a donor or by a testamentary bequest and delivery by an executor without the saying of the Mass as requested by the donor or testator.

The words of canon 829 have been advanced by some commentators to support the proposition that at *common law* title to the Mass stipend vests immediately, and unconditionally, in the priest upon delivery. Commentators of this school of thought in common law countries are influenced by such continental canonists as Merkelbach,[2] who comments on canon 829 as follows:

> "Stipendium enim traditione in dominium sacerdotis transivit; res autem perit domino."

A consequence of this continental school of thought carried over into the United States is set forth in THE JURIST,[3] in these words:

> "The imposition of the condition precedent seems not to square with the priest's obligation to say the Mass even if he loses the stipend or it is stolen from him. Cf. canon 829.—Ed."

The same thought is again expressed in the same volume of THE JURIST: [4]

[1] Woywod, *The New Canon Law*, p. 167.

[2] *Summa Theologiae Moralis* (3. ed.), III, 312.

[3] III (1943), 418.

[4] III (1943), 454.

"It can even be maintained, and perhaps should be maintained that it is a gift without a condition; for if the stipend should be lost, the priest would be obliged to say the Mass; this would not be so if he had no title to the stipend. Cf. canon 829.—Ed."

On the other hand it has been strongly contended by common law writers, foremost in their fields, buttressed by decisions of State courts of last resort and by decisions of the Surrogates' Courts of New York that at *common law* title to the Mass stipend vests in the priest upon the performance of the condition precedent that he say the Mass as requested, and not before.

It is believed that the unconsidered use by the continental canonists, and its acceptance on its face value by American and English canonists, of the Roman law maxim, "*Res perit domino*" "The destruction of the thing is the loss of the owner", has caused this conflict.

"*Res perit domino*" was a maxim of the old Roman law of *sales*[5] and declared that the risk of loss fell on the owner when the property which was the subject of the sale was destroyed. That this maxim of the law of sales, or any maxim of the law of sales, should not be applied to Mass stipends in view of the fact that every canon law commentator, without exception, holds unswervingly to the fundamental truth that the Mass is not the subject of sale and that the Mass stipend is not the price of the Mass, would appear, even at first glance, to be indisputable and undisputed. However, the beguilement of the maxim, "*Res perit domino*", has so clouded the reasoning of some canon law commentators of great influence that it seems necessary to analyze its application to canon 829.

This maxim has unquestionably been traced back to the law of sales of the Institutes of Justinian, dating perhaps from early Roman law, where it is laid down:

"As soon as the contract of purchase and sale is made, which is, if the transaction is without writing, when the price is agreed, the risk of the thing sold immediately falls upon the buyer, although it has not yet been delivered to him. Thus, if the slave dies or is injured in any part of his body, or the whole or any part of the house is burned, or the whole or any part of the land is carried away by flood or is diminished or injured by an inundation or by a tempest which overthrows the trees, it is the

[5] "Haec omnia nobis videntur niti confusione qua contractus de celebratione et applicatione missae assimilatur venditioni." Vermeersch, *Theologia Moralis*, (Rome, 3. ed.), III, § 272.

loss of the buyer, who must pay the price though he does not receive the thing," (at this point Williston in 9 *Harvard Law Review* 72 adds these words of his own) "and though, it may be added, delivery was necessary according to the Roman law for the transfer of title, as it is generally in the modern civil law."[6]

This catchy maxim of the Roman law was adopted into the common law and was applied for a time exclusively to the law of sales and then to a minor extent influenced other fields of the common law. Broom, in *Legal Maxims*,[7] says: "The maxim *damnum sentit dominus* or *res perit domino* expresses the general rule applicable in our (English) law to the case of the accidental destruction of goods contracted to be sold."

Such maxims, according to Fabrequettes,[8] "play the role of the needle with respect to the pole. They do nothing but point." Pound,[9] says: "In modern law . . . as in the case of the needle, there is much deviation and many things may serve to deflect. Nowadays we know maxims chiefly through Broom. . . . Broom's book is an attempt to make maxims the basis of a legal philosophy. . . . But the attempt to revive a jurisprudence of maxims came to nothing. . . . A jurisprudence of conception soon evolved and was the main engine of nineteenth century justice."

Williston on *Contracts*,[10] proves conclusively that the maxim, "*Res perit domino*", was not of universal application in the old Roman law and is not of universal application in the common law. He shows that under the Roman *Corpus Juris* in some cases[11] the

[6] (3.23) 3.

Dr. Franz Hoffman endeavored to show that the maxim "*res perit domino*" was of even greater antiquity than The Institutes of Justinian and that it dated back to a very early Greek origin.—*Periculum Beim Kauf*, (Vienna, 1870), pp. 169-188.

Note especially that the maxim "*res perit domino*" was not included as one of the 88 *regulae juris* in the Liber Sextus of Boniface VIII, which is now cited as "the Sext"; and Cicognani says that maxims not so included are devoid of juridic authority, *Canon Law*, (Philadelphia: The Dolphin Press, 1935), p. 301.

[7] 10. ed. (London, 1939), p. 534.

[8] *Logique Judiciaire Et L'Art De Juger*, 194.

[9] "Maxims Of Equity"—34 *Harvard Law Review* (June, 1921), 823.

[10] Revised Edition (1936).

[11] "If a sale was subject to a suspensive (precedent) condition, and the subject matter was destroyed before fulfillment of the condition, the loss fell on the seller."—Section 950.

risk was on the owner but that in other cases [12] the risk was not on the owner. He establishes that in the American and English common law the risk is sometimes [13] on the owner and sometimes [14] not on the owner.

The implication contained in the notes of THE JURIST:

> "The imposition of the condition precedent seems not to square with the priest's obligation to say the Mass even if he loses the stipend or it is stolen from him. Cf. canon 829.—Ed."; and
>
> "It can even be maintained and perhaps should be maintained that it is a gift without a condition; for if the stipend should be lost the priest would be obliged to say the Mass; this would not be so if he had no title to the stipend. Cf. canon 829.—Ed.",

that the priest takes at common law an absolute title to the Mass stipend on delivery, free of the condition precedent, is the conclusion of an invalid syllogism, the first premise of which is an erroneous statement of common law, viz., "*The risk of loss is always on the owner.*" The next premise of the invalid syllogism is true: "*The risk of loss of a Mass stipend is on the priest-donee of the Mass stipend.*" The falso conclusion is: "*Therefore the priest-donee of the Mass stipend is the owner of the Mass stipend free of the condition precedent that he say the Mass as requested.*"

Father Donovan correctly states the *canon law* in his article titled: "Taxing Mass Stipends or Offering by Legacy", in *The Homiletic and Pastoral Review*,[15] when he states therein:

> ". . . the canons of the Code as to Mass obligations leave no room for the slightest doubt about a priest having no right whatsoever to Mass offerings or stipends until he himself has said the Masses corresponding to those offerings. . . . If he is not immediately entitled to the fund, but only immediately after the application of the Mass, does this doctrine find support in custom and usage recognized by the Church and is it therefore a part of the law of the Church? It finds full support not only in the custom and usage of the Church but also in her strict prescriptions.

[12] "In order to transfer the risk to the buyer, it was necessary that there should be emptio perfecta . . . bargain . . . unconditional, . . . specific goods . . . price . . . certain."—Section 950.

[13] "Risk generally attends ownership."—Section 962.

[14] "Risk is on the buyer in a conditional sale—where goods are delivered to the buyer but title is retained by the seller until the price is paid."—Section 965.

[15] XIV (November, 1943), 98.

> . . . the priest is . . . the bailee of Mass offerings or stipends until those Masses are said. . . ." [16]

Canon 829, the only canon relied upon by those who claim that title to Mass stipends vests on delivery to the priest,[17] provides for the exercise of no incidents of ownership of the Mass stipend, viz., *jus possidendi, jus utendi, jus fruendi, jus abutendi, jus disponendi*, or *jus prohibendi.* It cannot and does not attempt to grant any new *common law* rights of property to the priest. It takes away no existing *canon law* obligations from the priest. It does expressly preserve for the offerer of the Mass stipend an existing obligation under *canon law* that the Mass be said and applied as requested, a paramount obligation imposed by the Church to secure the interests of the Church, and not one imposed for the purpose of securing any contractual rights between the priest-donee of the Mass stipend and the offerer. Between the layman and the priest-donee of a Mass stipend there is no contract at common law, at civil law, or at canon law. Those commentators who contend that the delivery of a Mass stipend to a priest creates an innominate contract *do ut facias* are in error.

Canon law imposes on the priest a more strict obligation than does the common law in the matter of the performance of the condition precedent. Under the common law, for instance, assuming the priest to be a bailee of the Mass stipend until he has said the Mass, his obligation would be limited to due care of the Mass stipend and he would not be responsible if the Mass stipend had been stolen from him or if it had been lost through no fault of his own. Canon 829 provides that at canon law the obligation to say the Mass would still remain with the priest exactly as it was previous to the theft or loss of the stipend and the canon law obligation of the priest to say and apply the Mass as requested

[16] In support of his statements Father Donovan quotes Woywod; see also Pruemmer, *Manuale Theologiae Moralis,* III, 193, 198.

[17] Cf. "There is no completed gift where there is a condition attached to the delivery and that condition has been unperformed."—Trimble, J., in *Hendrix v. Corning,* 201 Mo. App. 555, at 558, (1919).

Note also, in the Roman law, as in the civil law today, title to a *donatio* passed by *traditio*, and *traditio* is the transfer of ownership of the thing itself. Buckland says: ". . . as *traditio* was an informal transaction . . . it might be subject to condition . . . and in that case the ownership would not pass till the condition was satisfied."—*A Text Book of Roman Law from Augustus to Justinian,* (Cambridge, 1921), p. 231.

would not be discharged. The difference between the common law and the canon law, as expressed by canon 829, presents a true case of conflict of laws as that term is understood in common law jurisprudence.

No common law authorities need be cited to establish the proposition that, if a *property* question should arise in *common law* courts involving the liability of a priest who lost a Mass stipend through no fault of his own, the insurer liability of canon 829 would be wholly disregarded [18] and the common law liability based on fault would be the test adopted by the common law court. On the other hand, if a priest should seek relief in the common law courts from an order by his bishop to comply with canon 829 by saying the Masses, the priest maintaining that by common law he should be relieved from the saying of the Masses on the ground that the Mass stipends had been lost through no fault of his own, the bishop contending that the priest was obligated to say the Masses by the terms of canon 829, it is submitted that the common law court would dismiss the complaint of the priest and would give judgment for his bishop on the ground that a property question was not being litigated, but on the contrary a matter of internal church discipline.

It is submitted that the inference is warranted from canons 824, 826, 828, 832, 840 and 841 that a priest does not take title to the Mass stipend without the saying of the Mass as requested, but takes delivery of a gift on condition precedent, title to vest on the performance of the condition precedent, the saying of the Mass as requested by the donor. Canon 824 establishes the right in a priest, in general, to take title to a Mass stipend for celebrating and applying the Mass. Canons 826 and 832 respectively state that the priest receives Mass stipends "pro Missis" and "pro Missae applicatione". Canon 828 imposes an obligation upon the priest to say and apply all the Masses for which he accepts Mass stipends and the Church makes this obligation paramount, as has been heretofore stated. Canon 833 raises a presumption that the

[18] "A conflicting canon yields to the law of the land. . . ."—*In re St. Joseph's Lithuanian Roman Catholic Church*, 273 Pa. 486, (1922); see *Ryan v. Dunzilla*, 239 Pa. 486, (1913). This proposition of law extends only to cases involving property and civil rights, and even in those cases is limited by principles of conflict of laws. See *Watson v. Jones*, 13 Wall. 679, 20 Law ed. 666, (1871); cf. *Farag v. Mardrous*, Court of Appeal of Alexandria (Egyptian Mixed Court), 19 *Juris. des Trib. de la Réforme*, 231, (1894).

donor on giving the Mass stipend has requested only the application, but unqualifiedly the application, of the Mass.

Canon 838 gives a priest who has accepted a Mass stipend power to send that self-same stipend to another priest, if the other priest is well known to him and/or worthy of confidence. If the first priest had taken title to the Mass stipend free of condition precedent that he say the Mass as requested, he would be sending his own money to the second priest. He does not send his own money to the second priest. He sends the money of the original donor. The first priest is *the donee of a power,* both in canon law and in the common law, to make a gift to the second priest on condition precedent that the second priest say the Mass according to the intention of the original donor. Canon 837 requires all donees of a power to deliver Mass stipends, whether they be layman, priest or bishop, to exercise that power and make delivery *as soon as possible.* The layman, of course, had not taken title to the Mass stipend, and neither the priest nor the bishop had taken title to the Mass stipends simply on delivery and their rights in the Mass stipends had not risen beyond the power to transfer title to another priest.

Canons 834 and 835 place limits on the time a priest-donee of a Mass stipend can take in the performance of the condition precedent to the vesting of the title to the Mass stipend, *viz.*, the saying and application of the Mass as requested by the donor. By canon 841 administrators and others, and this canon includes priest-donees of Mass stipends, (it being kept in mind that canon 837 imposes a duty on all donees of a power to distribute Mass stipends to do so *as soon as possible*), who are obliged to have Masses said or to say them, must transmit to their Ordinaries *at the end of the year* the Mass stipend for Masses which have not been said within the year. If a priest had taken unconditional title to the Mass stipends merely on delivery to him, he would not be obliged to send those very same stipends to his bishop. By canon 840 the first priest, the priest-donee of a Mass stipend, in sending the Mass stipend to the second priest must (except under special circumstances) send the whole stipend to the second priest, even though the statutory Mass stipend of the diocese where the second priest was located would be smaller than the statutory stipend of the diocese where the first priest was located. It is a fair inference from this canon that title to the Mass stipend had not vested in the first priest free

of the condition precedent that he say the Mass as requested by the original donor of the Mass stipend.

Finally, practically every priest who dies leaves unsaid a few Mass Intentions for which he had received Mass stipends. The deceased priest was not the owner of those unsatisfied Mass Intentions at common law, or at canon law, at the time of his death. Such Mass stipends are not part of the assets of the deceased priest and should not be included in the inventory of his estate. Title to them was in the original offerers. By his will, or otherwise, the deceased priest should have made provision in accordance with canon law or justice for the satisfaction of all such unfulfilled Mass Intentions. Even death does not excuse a priest-donee of Mass stipends from making arrangements for their satisfaction. In view of the fact that the Church holds the obligation to have a Mass said and applied for each Mass stipend accepted by a priest so sacred and so paramount, the custom has arisen in some dioceses for the bishop, in cases where one of the priests had died apparently leaving unsaid Mass Intentions, to request his fellow priests to say Masses in satisfaction of those apparently unfulfilled Mass Intentions. As the Mass stipends for Mass Intentions known to be unsatisfied are not part of the estate of the deceased priest, the executor has no power to administer them as part of the assets of the estate, and he should be instructed to deliver them to the bishop in the same manner as other unfulfilled Mass stipends are required to be delivered to the bishop under canon 841. If title to the Mass stipends vested in the priest-donee of a Mass stipend on delivery and before the performance of the condition precedent, the saying of the Masses as requested, then the Mass stipends would be part of the estate of the deceased priest. The inference that title does not vest until the Masses are said as requested, until the performance of the condition precedent, is warranted. The truth of this inference can be demonstrated by the following two syllogisms, the conclusion of the first being the minor premise of the second:

I.

Every one who has the authority to deliver for another property is *the donee of a power*.[19]

A priest—before saying the Mass—has the authority to deliver for another a Mass stipend to another priest.[20]

Therefore a priest—before saying the Mass—is *the donee of a power* to deliver a Mass stipend.

[19] 69 *Corpus Juris* 824. [20] Canon 837.

II.

No *donee of a power* to deliver a Mass stipend has title to the Mass stipend.[21]

A priest-donee—before saying the Mass—is *a donee of a power* to deliver a Mass stipend to another priset.[22]

Therefore a priest—before saying the Mass—has not title to the Mass stipend.

Scott on *Trusts*[23] indicates that there is much common law authority for the theory that bequests for Masses are gifts on condition precedent in his statement in Section 371.5:

> ". . . In several cases where a bequest was made to a particular priest for the saying of masses, the bequest was upheld not as a charitable trust, but as *a beneficial gift conditioned upon his saying masses.*" (*Emphasis inserted.*)

In support of his text Scott cites three cases: *Harrison v. Brophy*,[24] *Sherman v. Baker*,[25] and *Slattery v. Ward*.[26] There are two other early cases on the point, both in the Surrogates Courts of New York, *Estate of Howard*[27] and *Matter of Zimmerman*.[28]

It is submitted, therefore, that, at common law, at civil law and at canon law, a priest always receives the gift of a Mass stipend on condition precedent that he say the Mass as requested. This so both in the case of an *inter vivos* gift and also in the case of a testamentary bequest for Masses.

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[21] 69 *Corpus Juris* 824. Bettman, J., in the case of *In re Estate of Reilly*, 138 Ohio State 145 (1941), at page 150, speaking of the property right of the executor as donee of a power to distribute Mass stipends, where the issue was one of liability for inheritance taxes on Mass stipends, said: "Considering a mere direction to an executor, where does one find any *succession—any passing of property by will*—or any *right* in any particular person to *receive property* from the decedent's estate? There is merely the authorization to an executor to make an expenditure from the assets in his hands, before the division and passing of the property of the estate. There is thus no succession to any property upon which the tax may fall." (*Italics inserted*).

[22] Canon 837.

[23] (1939).

[24] 59 Kan. 1 (1898).

[25] 20 R. I. 446 (1898).

[26] 45 R. I. 54 (1923).

[27] 5 Misc. (N. Y.) 295 (1893).

[28] 22 Misc. (N. Y.) 411 (1898).

VALIDATION OF A CONVERT'S MARRIAGE

A Lutheran patient in a sanatorium has asked the Catholic chaplain to be received into the Church. The chaplain finds that the patient is fully instructed and well disposed, but that he is married to a Lutheran woman who is his second cousin. There is not only a serious presumption but a practical certainty that the woman would refuse to appear before a priest for convalidating the marriage, and would likewise remain intransigent if she were asked to furnish any guarantees for the Catholic baptism and training of the children of the marriage.

1. To what extent are baptized non-Catholics subject to the Church's matrimonial impediments?

2. Who is the proper pastor for expediting the various matters which need attention in this matrimonial case?

3. If the marriage be invalid, must its convalidation be effected in the juridical form prescribed by the Church's law?

4. Would the Holy See grant a *sanatio in radice* if the convert would do all in his power to bring about the conversion of his consort and to rear in the Catholic faith the children which may be born of the union?

5. Should the prospective convert be advised, in view of the apparent insuperable difficulties, to obtain a civil divorce before he be allowed to enter the Church, or may he be admitted to the profession of faith etc., if nothing can be done at the time to rectify his present marital status?

CAPPELLANUS

Canon 87.—Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura.

Canon 1076.—§ 2. In linea collaterali irritum est [matrimonium] usque ad tertium gradum inclusive, ita tamen ut matrimonii impedimentum toties tantum multiplicetur quoties communis stipes multiplicatur.

Canon 1070.—§ 1. Nullum est matrimonium contractum a persona non baptizata cum persona baptizata in Ecclesia catholica vel ad eandem ex haeresi aut schismate conversa.

§ 2. Si pars tempore contracti matrimonii tamquam baptizata communiter habebatur aut eius baptismus erat dubius, standum est, ad normam can. 1014, pro valore matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

Canon 1099.—§ 1. Ad statutam superius formam servandam tenentur:

1°. Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt;

2°. Iidem, de quibus supra, si cum acatholicis sive baptizatis sive non baptizatis etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus matrimonium contrahant;

3°. Orientales, si cum latinis contrahant hac forma adstrictis.

§ 2. Firmo autem praescripto § 1, n. 1, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint.

Canon 738.—§ 1. Minister ordinarius baptismi sollemnis est sacerdos; sed eius collatio reservatur parocho vel alii sacerdoti de eiusdem parochi vel Ordinarii loci licentia, quae in casu necessitatis legitime praesumitur.

§ 2. Etiam peregrinus a parocho proprio in sua paroecia sollemniter baptizetur, si id facile et sine mora fieri potest; secus peregrinum quilibet parochus in suo territorio potest sollemniter baptizare.

Canon 2314. — § 1. Omnes a christiana fide apostatae et omnes et singuli haeretici aut schismatici:

1°. Incurrunt ipso facto excommunicationem;

2°. Nisi moniti resipuerint, priventur beneficio, dignitate, pensione, officio aliove munere, si quod in Ecclesia habeant, infames declarentur, et clerici, iterata monitione, deponantur;

3°. Si sectae acatholicae nomen dederint vel publice adhaeserint, ipso facto infames sunt et, firmo praescripto can. 188, n. 4, clerici, monitione incassum praemissa, degradentur.

§ 2. Absolutio ab excommunicatione de qua in § 1, in foro conscientiae impertienda, est speciali modo Sedi Apostolicae reservata. Si tamen delictum apostasiae, haeresis vel schismatis ad forum externum Ordinarii loci quovis modo deductum fuerit, etiam per voluntariam confessionem, idem Ordinarius, non vero Vicarius Generalis sine mandato speciali, resipiscentem praevia abiuratione iuridice peracta aliisque servatis de iure servandis, sua auctoritate ordinaria in foro exteriore absolvere potest; ita vero absolutus, potest deinde a peccato absolvi a quolibet confessario in foro conscientiae. Abiuratio vero habetur iuridice peracta cum fit coram ipso Ordinario loci vel eius delegato et saltem duobus testibus.

Canon 2228.—Poena lege statuta non incurritur, nisi delictum fuerit in suo genere perfectum secundum proprietatem verborum legis.

Canon 2219.—§ 1. In poenis benignior est interpretatio facienda.

§ 3. Non licet poenam de persona ad personam vel de casu ad casum producere, quamvis par adsit ratio, imo gravior, salvo tamen praescripto can. 2231.

Canon 1133.—§ 1. Ad convalidandum matrimonium irritum ob impedimentum dirimens, requiritur ut cesset vel dispensetur impedimentum et consensum renovet saltem pars impedimenti conscia.

§ 2. Haec renovatio iure ecclesiastico requiritur ad validitatem, etiamsi initio utraque pars consensum praestiterit nec postea revocaverit.

Canon 1134. — Renovatio consensus debet esse novus voluntatis actus in matrimonium quod constet ab initio nullum fuisse.

Canon 1135. — § 1. Si impedimentum sit publicum, consensus ab utraque parte renovandus est forma iure praescripta.

Canon 1037. — Publicum censetur impedimentum quod probari in foro externo potest; secus est occultum.

Canon 1139.—§ 1. Quodlibet matrimonium initum cum utriusque partis consensu naturaliter sufficiente, sed iuridice inefficicaci ob dirimens impedimentum iuris ecclesiasticae vel ob defectum legitimae formae, potest in radice sanari, dummodo consensus perseveret.

Canon 1141.—Sanatio in radice concedi unice potest ab Apostolica Sede.

Canon 1061.—§ 1. Ecclesia super impedimento mixtae religionis non dispensat nisi:

1°. Urgeant iustae ac graves causae;

2°. Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;

3°. Moralis habeatur certitudo de cautionum implemento.

Canon 1071.—Quae de mixtis nuptiis in canonibus 1060–1064 praescripta sunt, applicari quoque debent matrimoniis quibus obstat impedimentum disparitatis cultus.

Quinquennial faculty granted to bishops by the Holy Office:

Sanandi in radice matrimonia attentata coram officiali civili vel ministro acatholico a suis subditis etiam extra territorium, aut non subditis, intra limites proprii territorii, cum impedimento mixtae religionis aut disparitatis cultus, dummodo consensus in utroque coniuge perseveret, isque legitime renovari non possit, sive quia pars acatholica de invaliditate matrimonii moneri nequeat sine periculo gravis damni aut incommodi a catholico coniuge subeundi; sive quia pars acatholica ad renovandum coram Ecclesia matrimonialem consensum, aut ad cautiones praestandas, ad praescriptum Cod. I. C. can. 1061, § 2, ullo modo induci nequeat; exceptis casibus: 1° in quo pars acatholica adversatur baptismo vel catholicae educationi prolis utriusque sexus natae vel nasciturae; 2° in quo ante attentatum matrimonium, sive privatim sive per publicum actum, partes se obstrinxerunt educationi non catholicae prolis, uti supra: dummodo aliud non obstet canonicum impedimentum dirimens, super quo ipse dispensandi aut sanandi facultate non polleat.

Quinquennial faculty granted to bishops by the Sacred Congregation of the Sacraments:

Sanandi in radice matrimonia nulliter contracta ob aliquod ex impedimentis iuris ecclesiastici maioris vel minoris gradus, exceptis iis provenientibus ex sacro presbyteratus ordine et affinitate in linea recta, matrimonio consummato, si magnum adsit incommodum requirendi a parte, ignara nullitatis matrimonii, renovationem consensus, dummodo tamen prior maritalis consensus perseveret et absit periculum divortii; monita tamen parte conscia impedimenti de effectu huius sanationis et debita facta adnotatione in libro baptizatorum et matrimoniorum.

1. All validly baptized persons, Catholics and non-Catholics alike, are subject to the Church's laws on matrimonial impediments, unless they are expressly exempted. Such express exemption is granted in canon 1070, § 1, for baptized Protestants in relation to

the impediment of disparity of worship, if they have never been converted from their heresy to the Church. In designating who are subject to this impediment canon 1070, § 1, mentions only those who have received baptism in the Catholic Church, or who have been converted to the Church from heresy or schism. Thus it is directly implied that all who have not received baptism in the Catholic Church, and all who have not been converted to the Church from heresy or schism, are not included under this law.

In canon 1099, § 2, baptized non-Catholics, that is to say, baptized persons who have never belonged to the Catholic faith, are positively excluded from being subject to the law of the Church regarding the juridical form for the contracting of marriage. Even such as received Catholic baptism are not held by this law in the event that from infancy onward they grew up in heresy, in schism, in infidelity, or without any religion, if they were born of parents one or both of whom were non-Catholics, or of parents one or both of whom were apostates.

Apart from these two exceptions validly baptized persons are subject to the Church's various laws on matrimonial impediments. It must be noted, of course, that if a baptized Protestant of one sect marries a baptized Protestant of another sect the impediment of mixed religion does not exist in such a case, for the nature of the impediment postulates that one of the parties be a Catholic.

The subjection of baptized Protestants to the Church's laws on marriage as long as no exception is indicated for them follows directly from the principle which canon 87 enunciates. It is through baptism that one receives juridical personal status in the Church. This implies the acquisition of rights and the emergence of obligations. The enjoyment of the rights will of course be curtailed for their bearer when some kind of hindrance or obstacle on his part impairs the bond of communion in and with the Church, or when a censure has been enjoined or inflicted by the Church. But the incumbency of the obligations does not undergo any lessening or mitigation for him in consequence of any breach with the communion of the faithful. The objective status of obligatory subjection to the laws of the Church remains constant. Before, during, and after the breach of communion it remains one and the same. Changed circumstances in a person's life may of course occasion an increase or a decrease in the number of obligations to which a person then becomes subject.

2. If diocesan statute or recognized usage does not authorize the chaplain in his position to receive the prospective convert into the Church, then the matter will belong to the pastor of the territory in which the man has his domicile or quasi-domicile, or in which he has actual residence if he can claim neither a domicile nor a quasi-domicile elsewhere. If he has a domicile or quasi-domicile elsewhere, then he should be received into the Church not by the local pastor, but rather by his proper pastor, as long as this can be done easily and without undue delay. Under circumstances which involve inconvenience or delay for his reception into the Church the local pastor is authorized to act. All these indications assume that the local ordinary has waived his prior right to confer even conditional baptism upon adults and has delegated the faculty to absolve adults from the censure of heresy when they are to be received into the Church without conditional baptism. This is the practice quite generally current throughout this country.

If a convert is to be received with conditional baptism, then his abjuration of heresy or profession of faith in the external forum will precede, and his sacramental confession with conditional absolution from his sins will follow, the conditional baptism. If he is to be received without baptism in view of his earlier valid baptism, then his abjuration of heresy or profession of faith will be followed by his absolution in the external forum from the censure of heresy before he makes his sacramental confession to obtain absolution from his sins. It is to be noted that in the event of a conditional baptism it is not required that the convert be absolved from the censure of heresy. The factual doubt as to the existence of an earlier valid baptism in his case can be reduced to a legal doubt concerning the person's subjection to ecclesiastical jurisdiction, and so the excommunication which the law of the Church enacts for the profession of heresy may safely be regarded as non-existent.[1]

3. Canon 1133 plainly indicates that, for any marriage whose invalidity has resulted from the presence of an undispensed diriment impediment, the convalidation of such a marriage requires that the impediment either has ceased or has been dispensed, and that there be a renewal of consent for the marriage on the part of

[1] Cf. Waldron, *The Minister of Baptism*, The Catholic University of America Canon Law Studies, n. 170 (Washington, D. C.: The Catholic University of America Press, 1942), pp. 91-95.

at least the one who had knowledge of the previously extant impediment. Canon 1135 further requires that, if the impediment was a public one, then the consent must be renewed by both parties in the form prescribed by the Church's law.

It is true, of course, that baptized Protestants are not held by the Church's law in canon 1099 on the juridical form for the contracting of marriage, and thus the two Lutherans could now express a valid matrimonial consent apart from the observance of this juridical form *if* the impediment of consanguinity had been lifted by means of a proper dispensation. But the granting of such a dispensation to these two Protestants is altogether an unlikely occurrence, and hence one must reasonably expect that such a favor can follow only after the reception of one of the parties into the Church. In that instance, however, the law of the Code on the requisite juridical form would apply to the case, and thus a renewal of their consent by both parties in the prescribed juridical form would necessarily be called for if the convalidation of their marriage is to be effected according to the usual requirements of the law.

4. The *sanatio in radice* is a procedure which as a last resort in difficult cases the Church employs for the sake of convalidating an invalid union. It implies a granting of the required dispensation from the extant diriment impediment, and moreover relieves the parties not merely from the normally required exchange of matrimonial consent in the duly prescribed juridical form, through which as a general rule the matrimonial contract comes into being, but exempts them also from the need of re-expressing their matrimonial consent in any way. Naturally, this extraordinary mode of convalidation can not come into operation unless a true matrimonial consent, that is, one which answers to all the demands of the natural law, has been mutually exchanged at some time in the past and now still perdures, for the essential element of such a true matrimonial consent can be supplied by no one but the parties themselves. Its absence throughout the past, or its recall in the present, by even one of the two parties stands in the way of any possible *sanatio*. A *sanatio* is possible only when the basis for a valid marriage, that is, a sufficient consent in accordance with the requirements of the natural law, is still in existence.

Since in the present case the granting of a *sanatio* would prerequire the granting of a dispensation from the impediment of mixed religion, if not possibly also from the impediment of disparity of

worship *ad cautelam*, the latter must be possible before the granting of a *sanatio* may be undertaken.

In the light of the requirements of canons 1061 and 1071 no dispensation is available as long as the non-Catholic party has offered no guarantees for obviating in regard to the Catholic party the danger of perversion from his faith, and furthermore has furnished no security for the Catholic baptism and training of the future offspring of the marriage. But the pre-requisite conditions for the granting of a dispensation in connection with the application of a *sanatio* through the special faculty which the local ordinary has received from the Holy Office are tempered in comparison with the demands which the common law itself exacts for the simple granting of a dispensation from the impediment of mixed religion or of disparity of worship.

When it is impossible to have the two parties of a mixed marriage which was attempted in the presence of a civil official or non-Catholic minister to renew their consent according to the ordinary requirement of the law, either because the non-Catholic party can not be advised of the invalidity of the marriage without a concomitant danger of an impending serious harm or grievance to the Catholic party, or because the non-Catholic party can not in any way be induced to renew the matrimonial consent or also to furnish the regularly called for guarantees, then by special quinquennial faculty the local ordinary can grant a *sanatio* for such a marriage except in the cases 1) wherein the non-Catholic party is opposed to the baptism and Catholic training of the children of that union, that is, of the past as well as the future offspring, and 2) wherein the two parties, either privately or publicly, pledged themselves before the attempted marriage to provide a non-Catholic education for their children. This *sanatio*, however, can not be granted by the local ordinary if the case is attended with some other canonical diriment impediment in relation to which he enjoys no faculty for granting a dispensation or a *sanatio*.

On the other hand, through his quinquennial faculties by a special grant from the Sacred Congregation of the Sacraments the local ordinary can also, on the supposition of a mutually persevering matrimonial consent, grant a *sanatio* for a union which was contracted invalidly in view of an impediment of the ecclesiastical law, except the impediments of the sacred priesthood and of affinity in the direct (ascending or descending) line, if the former valid

marriage from which this impediment arises was actually consummated. The faculty is available only if the party who is in ignorance of the invalidity of the union can not without serious perplexity or grievous inconvenience be asked to renew the consent.

These faculties, especially when viewed conjointly, appear quite liberal. Yet it seems that they will not suffice for the handling of the case here proposed. The attempted union was invalid, not because of a defect in the required form, but because of the presence of the impediment of consanguinity. Hence there is wanting the very supposition on which alone the local ordinary could abstract from the ordinary requirement of the guarantees from the non-Catholic party. The non-insistence on the guarantees as a requirement in the use of the faculty granted by the Holy Office is a matter which is related, but only secondarily, to a union whose invalidity may have resulted from the lack of a dispensation from the impediment of disparity of worship. Primarily it is related to a marriage between a Catholic and a non-Catholic in which union the couple did not comply with the required form, inasmuch as they appeared before a civil magistrate or a non-Catholic minister in place of a properly authorized priest and two witnesses for the exchange of their matrimonial consent. But the two Lutheran parties were not required to appear before an authorized priest and witnesses in order to be able to contract a valid union. Nor was the impediment of mixed religion or of disparity of worship present in their case at the time of their attempted marriage. Hence the supposition on the basis of which the local ordinary could use the faculty granted him by the Holy Office is in fact wanting in the case.

The faculty received by the local ordinary from the Sacred Congregation of the Sacraments indeed makes it possible for him to grant a *sanatio* inasfar as the invalid marriage resulted from the undispensed impediment of consanguinity in the third degree of the collateral line. But the wording of the faculty does not authorize him to abstract from the normal requirement of the guarantees, as does the formulary of the faculty granted him by the Holy Office. Since, then, the constituent elements and circumstances of the present case do not correspond to either of the two sets of circumstances envisaged in the two separate faculties, it seems that the local ordinary can not grant a *sanatio* even if the Lutheran woman, the while she refuses the guarantees, is nevertheless not opposed to the baptism and Catholic training of the children and has not pledged herself to procure a non-Catholic education for them.

If it be found that the woman's reluctance, or even refusal, to renew her matrimonial consent before a priest and witnesses upon the man's conversion and reception into the Church, as also her non-compliance in any positive way in the giving of the required guarantees, does not imply an opposition to the Catholic baptism and training of the children of her union, then the way would still be open for the possible obtaining of a *sanatio in radice* from the Holy See, provided that the convert's reassurances within the perspective of attendant circumstances would be such as to beget the all-important moral certitude of security for the faith of the father and children, for without the possession of such certitude no authority in the Church can dare to grant a dispensation in defiance of the divine law, which so rigorously but incontestably forbids the courting of all serious risks with the precious divine gift of the true faith.

5. A closer study of the submitted case in its manifold attendant circumstances and in its future probable eventualities could perhaps entitle one to give some definitive advice. But in the absence of any more knowledge than one can gain from the case as above described, it seems indicated to let the man's conscience be his own monitor. This does not mean to imply that the man should be left uninformed about the crucial difficulties inherent in the case. If he be given a true appreciation of what must be required of him as a good Catholic, and of what hindrances apparently stand in the way if he intends to persevere in his present union, but at the same time is encouraged to consider no sacrifice too great for acquiring God's wonderful gift of the true faith in his own life, then the fact of presently holding off his reception into the formal membership of the Church may, far from proving a calamity, become an efficacious means for a more satisfactory solution of his problem in a not distant future.

Earnest prayer and the courage to follow his best convictions will prove the most serviceable instruments for him. It is not to be assumed that his sincerity in finding the truth and in regulating his life accordingly will leave his difficulties unsolved over a long span of time. It is the consoling experience of godfearing souls that, when human helpfulness has failed, Divine Providence still finds a way.

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STATUS OF RELIGIOUS ORATORY AFTER WAIVER OF RIGHT TO PUBLIC ORATORY

In order to obtain from the episcopal local ordinary permission and approval for the erection of a religious house in his diocese, a clerical religious institute through the action of its superior waived its right and privilege to establish a church or public oratory in connection with the new foundation, and, in line with the ordinary's provision, erected what was to have the status simply of a semi-public oratory.

1. Could the superiors of this Capuchin community agree to renounce their right to have a church or public oratory, so that the erected oratory was of a merely semi-public character?

2. Can the members of this monastery, by visiting their monastery chapel, comply with the required condition of a visit to a Franciscan church for the gaining of the Portiuncula indulgence?

FRATER PIUS

Canon 497.—§ 2. Constituendae novae domus permissio facultatem secumfert pro religionibus clericalibus habendi ecclesiam vel publicum oratorium domui adnexum, salvo praescripto can. 1162, § 4, et sacra ministeria peragendi, servatis de iure servandis; pro omnibus religionibus, pia opera exercendi religionis propria, salvis conditionibus in ipsa permissione appositis.

Canon 1162. — § 4. Etiam sodales religiosi, licet consensum constituendae novae domus in dioecesi vel civitate ab Ordinario loci retulerint, antequam tamen ecclesiam vel oratorium publicum in certo ac determinato loco aedificent, Ordinarii loci licentiam obtinere debent.

Canon 1161.—Ecclesiae nomine intelligitur aedes sacra divino cultui dedicata eum potissimum in finem ut omnibus Christifidelibus usui sit ad divinum cultum publice exercendum.

Canon 1188.—§ 1. Oratorium est locus divino cultui destinatus, non tamen eo potissimum fine ut universo fidelium populo usui sit ad religionem publice colendam.

§ 2. Est vero oratorium:

1°. *Publicum*, si praecipue erectum sit in commodum alicuius collegii aut etiam privatorum, ita tamen ut omnibus fidelibus, tempore saltem divinorum officiorum, ius sit, legitime comprobatum, illud adeundi;

2°. *Semi-publicum*, si in commodum alicuius communitatis vel coetus fidelium eo convenientium erectum sit, neque librum cuique sit illud adire;

3°. *Privatum* seu *domesticum*, si in privatis aedibus in commodum alicuius tantum familiae vel personae erectum sit.

Canon 1191.—§ 1. Oratoria publica eodem iure quo ecclesiae reguntur.

Canon 1193.—In oratoriis semi-publicis, legitime erectis, omnia divina officia functionesve ecclesiasticae celebrari possunt, nisi obstent rubricae aut Ordinarius aliqua exceperit.

Canon 413.—§ 1. Quodlibet Capitulum obligatione tenetur quotidie divina officia in choro rite persolvendi, salvis fundationis legibus.

Canon 610.—§ 1. In religionibus sive virorum sive mulierum, quibus est chori obligato, in singulis domibus ubi quatuor saltem sint religiosi choro obligati et actu legitime non impediti, et etiam pauciores, si ita ferant constitutiones, debet ad normam constitutionum quotidie divinum officium communiter persolvi.

S. C. Ep. et Reg., *Cenomanen.*, 19 apr. 1844 (*Fontes Cod. I. C.*, n. 1938):

1. Utrum Moniales teneantur *sub gravi* Officium Divinum publice in choro recitare.

Ad 1. Caietanus de Alexandris in opere, cui titulum dedit *Confessarius Monialium* (part. 2, c. 1, de praecipuis Monialium obligation., § 1, de obligat. horar. canonic.) praefatae questioni ita respondet: "Teneri tum ex antiqua Ecclesiae consuetudine, tum ex statutis fere omnium religionum, tum ex Clementin. 1, *de celebrat. Missar.*, tum ex communi Doctorum, et talis obligatio est sub mortali, praecipue respectu Abbatissae; quia quando obligatio cadit in corpus mysticum alicuius communitatis, ad caput talis corporis pertinet praecipue curare huiusmodi oneris solutionem. Obligantur quoque Moniales collective sumptae, quia haec obligatio afficit Communitatem, quam ipsae constituunt; divisive tamen acceptae non tenentur, nisi magnam iacturam officium pateretur; quia ad interessendum in choro obligantur iuxta mensuram regulae, quae ad poenam tantummodo obligat, non ad culpam saltem mortalem, et est communis sententia."

S.R.C., *Ordinis Minorum Conventualium Sancti Francisci*, 12 dec. 1879:

Dubium I: An Fratres Minores praecepto chori satisfaciant Officium divinum recitando in Oratorio privato Conventus ab Ecclesia separata?

Dubium II: An praecepto Chori satisfaciant, Officium divinum recitando in Oratorio privato Conventus quod, aperto muro vel accessu, Ecclesiae iungitur?

Dubium III: An Superior localis dispensare possit, ut, eius arbitrio ex causa, veluti ob nimium frigus seu calorem, per aliquot menses Officium divinum recitetur extra Ecclesiam in Oratorio Conventus seu Sacristia?

Ad I. "Negative."

Ad II. "Affirmative, iuxta modum; nimirum: Ad Rmum Episcopum qui tamquam Apostolicae Sedis Delegatus visitet locum, et videat an sit decens et cum Ecclesia communicet."

Ad III. "Provisum in secundo."[1]

Canon 69.—Nemo cogitur uti privilegio in sui dumtaxat favorem concesso, nisi alio ex capite exsurgat obligatio.

Canon 929.—Fideles utriusque sexus qui, perfectionis studio vel institutionis seu educationis aut etiam valetudinis causa in domibus ecclesia vel publico sacello carentibus, de consensu Ordinariorum constitutis, vitam communem agunt, itemque personae omnes ad illis ministrandum ibidem commorantes, quoties ad lucrandas indulgentias praescribatur visitatio alicuius ecclesiae non

[1] *Decr. Auth.*, n. 3506.

determinatae, vel indeterminati alicuius publici oratorii, visitare queunt propriae domus sacellum in quo obligationi audiendi Sacrum iure satisfacere possunt, dummodo cetera opera iniuncta rite perstiterint.

Preces et pia opera in favorem omnium Christifidelium vel quorumdam coetuum personarum indulgentiis ditata et opportune recognita (Typis Polyglottis Vaticanis, 1938), n. 648: Ut veneratio, qua Assisiense de Portiuncula Sacellum fideles prosequuntur, nihil unquam capiat detrimenti, immo etiam cotidie magis augeatur, in nulla ecclesia nulloque oratorio, vel Franciscalis cuiuslibet Instituti, quod a memorato Sacello minus distet quam tria, uti vocant, chilometra, haec Indulgentia altero die mensis augusti lucrifieri in posterum queat, etsi id antehac licuit, nisi ab iis tantum qui domum ecclesiae vel oratorio continentem incolant, modo tamen aut physice aut moraliter impediantur quominus ad idem Portiunculae Sacellum se conferant.

Si qua peculiari de causa haec Indulgentia semi-publicis oratoriis concedenda videatur, eadem unquam ne faveat nisi communitati vel coetui fidelium, in cuius commodum oratoria illa erecta sint.

From the foregoing pertinent canons and, in particular, the cited responses of the Congregations, one could argue that the religious superiors could not forego the privilege or prerogative which the law accords when it grants to clerical religious institutes the right of having a church or public oratory annexed to the religious institute when for the erection of the latter the needed permission has been duly obtained from the local ordinary. The prerogative is one which is meant for the community of religious in its corporate character as a collegiate personality, and not for the individual members separately as a personal privilege. In consequence, just as a cleric is incapable of foregoing or surrendering the privileges which are proper to his clerical state, so also a religious superior has not the capacity of renouncing for himself or his subjects what the law establishes as a prerogative which accrues to them through the medium of the collegiate personality of which they form part.

Furthermore, since the community has the obligation of conducting daily the divine offices of the Conventual Mass and the Divine Office in choir, and since the use of the convent chapel instead of the convent church for these services was not granted by the Sacred Congregation of Rites, one could conclude that the law necessarily contemplates these services as being of a public character, and that therefore they must of necessity be conducted in a church or public oratory if the obligation is to be properly fulfilled. If that conclusion were inescapable, then indeed one would be compelled to admit that a local ordinary could not give his permission for the erection of a clerical religious house or institution

without at the same time making it possible for the community to have a church or a public oratory in which it could fulfill the essential obligations incumbent upon it.

Again, in the above reported reply of the Sacred Congregation of Bishops and Regulars (April 19, 1844) an affirmative answer was given to the query whether nuns were obliged *sub gravi* to recite the Divine Office *publicly* in choir. The inclusion of the word "publicly" in the query can, in view of the affirmative answer, be understood to imply that, if the obligation was to be fulfilled publicly, this could be achieved only by the recitation of the Divine Office *in a public place of worship.* If that obligation existed a century ago according to the demands of the liturgical law, and if the Code has not expressly effected a change in that law, then the law should be regarded as still having a binding force in the present. And if at present that law still exists, then one can find in it a verification of the condition which is set by canon 1193 in its clause "nisi obstent rubricae," and which correspondingly rules out the possibility of the *public* recitation of the Divine Office in choir within merely semi-public oratories.

But, one can advance some arguments which, if they do not incontestably succeed in their contention that the fulfillment of the choir obligation is now dissociable from its fulfillment in a church or public oratory, will at least create a sufficient doubt in relation to the acknowledged or recognized continuance of the demand which precluded such dissociation, that the obligation as formerly accepted need no longer be regarded in the present as having more than a doubtfully binding force. And, concerning doubtfully binding ecclesiastical laws, when the doubt arises precisely in view of the uncertain juridical import and intent of the laws in question, canon 15 states by way of general and absolute principle that such laws have no strictly binding force. This principle, in turn, follows as a practical corollary from the fundamental statement in canon 11, namely, that an invalidating effect attaches to only such laws in which the adverse act is branded as null and void either expressly or in some equally discernible fashion.

Now, if one examine the reply of the Sacred Congregation of Rites, as above quoted, one will note that the recitation of the Divine Office in the convent chapel of the Capuchin Friars was not granted the while a conventual church was available for the choir obligation. From the reply, then, one may not apodictically con-

clude that under any and all circumstances it was demanded that the recitation of the Divine Office in choir take place in a church for the proper fulfillment of the choir obligation.

Likewise, if the Sacred Congregation of Bishops and Regulars insisted that nuns had to fulfill "publicly" their choir obligation of reciting the Divine Office, there is still question whether it implied that the obligation had to be executed in a church or public oratory. It does not appear inconsequent that the Sacred Congregation could have regarded the public character of the act to consist in its performance by the community as a public moral personality. The discharge of the obligation seems indeed, according to the wording of the reply, to be connected with the public office of the Abbess, who as the authorized head of the community was held particularly chargeable with the fulfillment of the choir obligation. The nuns also were held accountable, but their obligation was stressed in relation to the collective character of the community, while it was waived in regard to their individual status as members, "*nisi magnam iacturam officium pateretur.*" So it may after all be justifiable to relate the public character of the choir obligation to the public status of the community as a collective moral personality, and not to the place of worship in which the community obligation as a public duty must find its fulfillment.

Neither canon 413, § 1, in what it demands of an ecclesiastical chapter of canons, nor canon 610, § 1, in what it specifically requires of a religious community which has the choir obligation, makes any mention of any requisite that points to the need of a church or of a public oratory as the exclusively suited place within which the choir obligation can be properly fulfilled to meet the essential demands of the law. Canon 610, § 1, deals simultaneously with the choir obligation of men and women religious alike. The law of the Code not only nowhere demands that women religious must fulfill this obligation in a church or public oratory, but rather definitely presupposes in canon 1109, § 2, that the chapel of women religious like that of a seminary may be of but a semi-public character.

It is perhaps not unreasonable to argue that, if the former disciplinary law which called for the public recitation of the Divine Office in choir pointed to a church or public oratory as a needed place for the discharge of this obligation, then the non-inclusion of this same law in the present Code can be understood as implying its lapse from continued existence, according to the statement of

canon 6, 6°, which indicates that the continued existence of this law would have to be sought, either in the fact that it is still implicitly contained in the Code, or in the fact that it is found in the approved liturgical books of the Church.

If either of these two assumptions can be definitely established, then of course the former law in this matter still obtains. But, in view of the doubts already raised, in view also of the silence of the Code in canons 413, § 1, and 610, § 1, where the addition of a phrase or word in regard to this obligation could so readily have been incorporated, and in view, finally, of the absence of any statement in canon 497, § 1, to the effect that the Holy See's permission along with the written consent of the local ordinary for the erection of an exempt religious house carries with it also the right of having a church or public oratory, one may well call into doubt the continued binding character of the law here discussed. The silence of canon 497 in § 1 seems particularly significant inasmuch as the same canon in § 2 makes mention of precisely those religious institutes for which the permission of erecting the religious house entails also the permission of having a church or a public oratory, provided that the condition set by canon 1162, § 4, has been complied with. Neither § 1 nor § 2 in canon 497 expressly grants to exempt religious houses of either men or women religious what § 2 of the same canon grants explicitly to both exempt and non-exempt clerical religious houses within the restrictions enacted in canon 1162, § 4.

With reference to the question whether a local ordinary may attach to his consent for the erection of a clerical religious house a condition contrary to the right of the religious house to have a church or a public oratory, Flanagan writes: "The local ordinary must approve the site upon which the sacred edifice is to be erected, before the religious may proceed to build. Consequently, a local ordinary who does not wish to permit the erection of a church or public oratory by a clerical institute has a means of obtaining his end. He can let it be known that he will not authorize the erection of the proposed religious house, if the religious intend to use the right conceded to them by canon 497, § 2, or he may refuse to approve the site, chosen by them, for their church or public oratory. In the first case, the religious may spontaneously renounce the use of their right in order to obtain authorization for the erection of the religious house. With regard to the second alternative, however, it must be emphasized that the local ordinary cannot arbitrarily

refuse to approve a site chosen by the religious for their church or oratory. Once the local ordinary has consented to the erection of the house, the religious of a clerical institute obtain an acquired right to a church or public oratory and, consequently, if the ordinary refuses to approve a location for the edifice, without just cause, they may seek a legal remedy against his decision by instituting a judicial action." [2] For the same opinion and interpretation one can point to the teaching of Jombart,[3] of Schaefer [4] and, in all probability, of Maroto.[5]

2. If it be granted, for the present, that the monastery lacks a church or public oratory, then the question arises: Can the members of the monastery gain the Portiuncula indulgence by visiting their own monastic chapel?

Vermeersch-Creusen,[6] Bouuaert-Simenon [7] and Hagedorn [8] argue that if the document of the indulgence mentions a particular church, then even those who are leading a community life may not visit their own chapel instead of the specified church. The visit must be made to the kind of church characterized, or to the particular church specified. From the *Preces et Pia Opera* (n. 648, as above quoted) it is quite evident that the semi-public chapels of religious communities are not to be counted among the privileged churches in which the Portiuncula indulgence may be gained. It is indicated there that if some such semi-public chapel should have obtained the privilege by special concession, the grant means to favor no one but the faithful of the community for whose convenience that oratory was erected.

But in a more recent decree (May 1, 1939) the Sacred Apostolic Penitentiary in the following words made known the Holy Father's

[2] *The canonical erection of religious houses*, The Catholic University of America Canon Law Studies, n. 179 (Washington, D. C.: The Catholic University of America Press, 1943), pp. 82-83.

[3] *Periodica*, XII (1924), 60.

[4] *Compendium de religiosis* (Münster i.W.: Officina Libraria Aschendorff, 1927), p. 97.

[5] *Commentarium pro Religiosis*, V (1924), 427.

[6] *Epitome Iuris Canonici*, II (5. ed., Mechliniae-Romae: H. Dessain, 1934), n. 218, p. 148.

[7] *Manuale Juris Canonici*, II (2. ed., Gandae et Leodii: Apud Auctores, 1935), n. 167, p. 148.

[8] *General Legislation on Indulgences* (Washington, D. C., 1924), p. 130.

pious desire to make more generous provision for the gaining of this indulgence: "Ssñus Dominus noster Pius divina Providentia Papa XII, id vehementer exoptans, ut christianus populus pretiosum eiusmodi Ecclesiae thesaurum uberiore usque modo participet, . . . pro impensissima pietate Sua, hoc decernere dignatus est, ut scilicet, . . . omnes Ecclesiae Cathedrales ac Paroeciales, ac praeterea aliae Ecclesiae aliaque Oratoria—pro quibus, in amplioribus praesertim Paroeciis, ex prudenti locorum Ordinarii [Ordinariorum?] arbitrio, fidelium commodum id postulare videatur—a Sacra Paenitentiaria Apostolica, per supplicem libellum ab Ordinario commendatum, Portiunculae privilegium obtinere possint. Contrariis quibuslibet minime obstantibus." [9]

Thus an easy way is opened for obtaining even for semi-public oratories and chapels the special Portiuncula privilege, which had become considerably restricted through the decree of July 10, 1924. It should not be found difficult for the monastery in question to enlist the proper commendation in order to acquire through the competent ordinary the privilege which otherwise it would lack in view of having in all probability but a semi-public oratory. If this procedure should not prove feasible, then recourse to the proper authorities in Rome may perhaps vindicate for the monastery their possession both *de iure* and *de facto* of an oratory which thenceforth must be accredited as a public oratory, concerning the status of which canon 1191, § 1, states: "Oratoria publica eodem iure quo ecclesiae reguntur."

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DISPENSATIONS BY A CHANCELLOR

May a dispensation in favor of a mixed marriage (*disparitatis cultus, mixtae religionis et disparitatis cultus ad cautelam*) be granted by phone in urgent cases before the *cautiones* have been signed with the understanding that the dispensation is granted provided the *cautiones* are signed? A case in point: A pastor living at some distance from a mission received a phone call from a soldier requesting validation of an attempted marriage (mixed). The pastor will visit the mission Sunday to take care of the marriage. The soldier leaves the following day (Monday). The pastor called the Chancery before leaving

[9] *Acta Apostolicae Sedis,* XXXI (1939), 226.

for the mission and requested the dispensation with the understanding that it will not be used unless the *cautiones* are signed.

Our Diocesan clergy make a biennial retreat outside the diocese. Can I, as Chancellor, grant a dispensation from that point to a priest wiring for same from the diocese? CANCELLARIUS

As to the query whether a Chancellor could subdelegate a pastor to grant a matrimonial dispensation after the signing of the *cautiones*, it is clear that he could not. If he were Vicar General, he could, because he would then be in the position of a delegate of the Holy See, and under Canon 199, § 2, he could subdelegate. But as Chancellor, he is already a subdelegate, since the Bishop subdelegates to him the power delegated to the Ordinary by the Holy See; and he can not subdelegate again.[1] Of course, the dispensation could be issued *in forma commissoria necessaria* (not *voluntaria*), to be effective when the *cautiones* are signed. Further, if the *cautiones* were given orally prior to the granting of the dispensation, the signing and the filing of them would seem to constitute only supplementary ministerial acts, required nevertheless by the commissory form for the validity of the execution of the dispensation. But the grantor could obviate the danger of invalid execution, in the latter case, by granting the dispensation *in forma gratiosa*, requiring by precept the supplementary ministerial acts. This he could not do as to the obtaining of the *cautiones* as such, because Canon 1061, § 1, 2 °, requires them as a *conditio sine qua non* to be verified at the time the dispensation is executed.

In the matter of the query regarding the Chancellor's right to grant a matrimonial dispensation to a priest of his diocese when he is outside the diocese, one notes that Canon 201, § 3, permits the exercise of voluntary jurisdiction by a superior who is outside his territory. The granting of a dispensation is an exercise of voluntary jurisdiction. This suffices so far as a dispensation from the banns is concerned, though obviously the jurisdiction can be exercised only in behalf of one's subjects. As to derived power of dispensing, such as that granted in the quinquennial faculties, the terms under which the power is granted must be consulted. It happens that the faculties from both the Holy Office and the Sacred Congregation of the Sacraments, as they affect matrimonial dispensations, permit the exercise of the power by a superior who is outside his diocese, and this in behalf of his subjects wherever

[1] Cf. Canon 199, §§ 4 and 5; also THE JURIST, III, 580, 581.

they may be and in behalf of non-diocesans who are actually within the diocese. The Chancellor could, therefore, issue a dispensation in virtue of the power delegated to him in the matter of the banns and in virtue of the power subdelegated in the matter of impediments, even though he were actually outside the diocese.

CIVIL DIVORCE REQUISITE FOR ECCLESIASTICAL ADJUDICATION?

Should a diocesan tribunal insist that the parties to a prospective marriage case be separated by a civil divorce before the tribunal would accept the *libellus* accusing a marriage? I am told that some tribunals so act, their reason being that should the trial begin without such a divorce the Bishop and/or the tribunal would be open to suit by the *pars conventa* for alienation of affection in the civil courts. Such a procedure does not seem to me to be in line with the attitude of the Church toward keeping marriages intact rather than promoting their disruption. Also it would not render the parties more susceptible to persuasion that they should continue their married life if the decision of the trial be "*non constat de nullitate*," and they should go back together.

VICE OFFICIALIS

Strictly speaking, an ecclesiastical tribunal can not, it would seem, require that a petitioner obtain a decree of civil divorce before his petition is accepted by the court. On the other hand, the tribunal should protect itself against civil suit for alienation of affections. There is the further possibility of persecution arising from indignation on the part of non-Catholics that an ecclesiastical tribunal would usurp what they conceive to be the exclusive territory of the secular tribunal. The probability of both of these consequences seems rather remote. Neither of them has occurred thus far in the history of the relations of Church and State in this country; or if it has, it has received no publicity. If in a special case, the danger of either of these consequences would appear to be proximate, the civil divorce would be indicated.

The difficulty arising from the obligation resting on the parties of reëstablishing marital cohabitation in the event that the decision of the court should be " non constat de nullitate " could be obviated in the case in which a civil divorce seems necessary by proceeding first with the ecclesiastical procedure in both instances and then requiring the decree of divorce before the issuance of the decree of the court.

Cases in which alienation of affections could be alleged would seem to be extremely rare. When matrimonial cases come to ecclesiastical tribunals, desertion by one or the other party has previously occurred. If the party deserted is the petitioner, one wonders how the secular tribunal could support the deserting party in claiming that the ecclesiastical tribunal alienated the other party's affections. If the deserting party is the petitioner in the ecclesiastical court, it would be obvious to the secular tribunal that his affections had been alienated long before he entered his petition with the ecclesiastical tribunal.

Of course, the party freed by the ecclesiastical tribunal could not attempt another marriage without obtaining a civil divorce. Otherwise, he would incur the penalties imposed on bigamists by the secular law.

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Decrees and Decisions

CANONICAL

SUPREMA SACRA CONGREGATIO S. OFFICII
DE PROHIBITIONE LIBRORUM [1]

Cum in pravis libris denuntiandis morae et omissiones sint saepe conquerendae plurimique christifideles in exitiali ignorantia circa nuntiationem et prohibitionem perniciosorum librorum versentur, Suprema S. Congregatio Sancti Officii opportunum ducit praecipua sacrorum canonum de hac re praescripta in memoriam revocare; per prava enim vel noxia scripta puritas fidei, integritas morum ipsaque salus animarum maximis periculis exponuntur, ut compertum est.

Profecto innumera scripta fidei et moribus adversantia, quae praesertim nostris temporibus ubique terrarum et variis linguis quotidie fere eduntur, Sedes Apostolica ipsa sollicite ac tempestive prohibere nequit. Opus proinde est, ut locorum Ordinarii, quorum est sanam et orthodoxam doctrinam conservare ac bonos mores tueri (c. 343, 1), per se aut per sacerdotes idoneos vigilent in libros, qui in proprio territorio eduntur aut venales prostant (c. 1397, 4), et quos damnandos iudicaverint, eos suis subditis prohibeant (c. 1395, 1). Ius et officium prohibendi ex iusta causa libros pro suis subditis competit etiam Abbati monasterii sui iuris et supremo religionis clericalis exemptae Moderatori cum suo Capitulo vel Consilio immo, in casu urgenti, aliis Superioribus maioribus cum proprio Consilio, ea tamen lege ut rem quantocius deferant ad supremum Moderatorem (c. 1395, 3). Attamen libros, qui subtilius examen exigant vel de quibus ad salutarem effectum consequendum supremae auctoritatis sententia requiri videatur, ad Apostolicae Sedis iudicium Ordinarii deferant (c. 1397, 5).

Omnium quidem fidelium, praesertim clericorum, est libros perniciosos competenti auctoritati denuntiare; sed peculiari titulo id pertinet ad clericos in dignitate ecclesiastica constitutos, ut sunt

[1] *Acta Apostolicae Sedis*, XXXV (1943), 144.

Legati Sanctae Sedis locorumque Ordinarii, atque ad eos qui doctrina ceteris praecellunt, ut Universitatum catholicarum Rectores Doctoresque.

Denuntiatia autem facienda est vel huic Congregationi S. Officii, vel Ordinario loci, declaratis quidem causis, quibus liber prohibendus existimetur. Iis vero, ad quos denuntiatio defertur, sanctum esto nomina denuntiantium secreta servare (c. 1397, 1, 2, 3).

Denique Ordinarii locorum aliique curam animarum habentes fideles opportune moneant: *a*) prohibitionem librorum id efficere, ut liber sine debita licentia nec edi vel iterum edi (nisi factis correctionibis et legitima approbatione obtenta), nec legi, nec retineri, nec vendi, nec in aliam linguam verti, nec ullo modo cum aliis communicari possit (c. 1398, 1, 2); *b*) libros ab Apostolica Sede damnatos ubique locorum et in quodcumque vertantur idioma prohibitos censeri (c. 1396); *c*) lege positiva ecclesiastica esse vetitos non tantum libros speciali decreto ab Apostolica Sede singillatim damnatos et in *Indicem librorum prohibitorum* relatos, vel a Conciliis particularibus sive ab Ordinariis pro suis subditis proscriptos, sed etiam libros prohibitos *ipso iure communi*, idest ex regulis c. 1399 contentis, quibus fere omnes libri pravi et de se noxii modo generali prohibentur; *d*) ex lege naturali vetari cuiuslibet libri lectio, quae proximum periculum spirituale praebeat, cum ius naturae prohibeat, ne quis se constituat in periculo amittendi veram fidem aut bonos mores; itaque licentiam utendi libris prohibitis a quovis obtentam nullo modo eximere ab hac prohibitione legis naturalis (c. 1405, 1).

Datum Romae, ex Aedibus Sancti Officii, die 17 Aprilis 1943.

I. Pepe, *Supr. S. Congr. S. Officii Notarius.*

SACRA CONGREGATIO CONCILII

ARCHIDIOECESIS T.[2]

DISTRIBUTIONUM INTER PRAESENTES

Die 14 Februarii 1942

Species Facti.—Duo capitulares ecclesiae cathedralis T., iubilationis indulto a Sacra Congregatione Concilii legitime donati, cum nonnullis functionibus capitularibus, quibus adnexae sunt distributiones inter praesentes, non interfuissent, his a Capitulo privati sunt. De hac agendi ratione penes Capitulum conquesti, innixi praescripto canonis 422 § 2 Codicis I.C., a Capitulo responsum ac-

ceperunt: distributiones inter praesentes eisdem non competere, attentis synodo dioecesana anno 1877 celebrata, statutis capitularibus et consuetudine, immo nec ad ipsas fallentias ex distributionibus quotidianis ius habere.

Revera synodus dioecesana in tit. XXVII § 8, praemisso quod " iuris dispositione pro praesentibus habendi qui . . . post quadragenarium chori servitium iubilationis indultum a Sede apostolica obtinuerint etc.," quapropter distributiones quotidianas percipiunt, in § 12 eiusdem tituli subdit: " nequeunt tamen illis obventionibus frui quae fundatione, recepta consuetudine vel statuto physicam personae praesentiam iis exigunt ut realiter praesentibus tantum sint concedendae."

Statuta vero capitularia anni 1924, quid aliquid singulare innuant, in art. 2 verba antea relata synodi dioecesanae repetunt ac causas memorant in canonibus 420 et 421 Codicis I. C. descriptas, " quibus canonici et beneficiati detenti, quamvis choro et functionibus desint, pro praesentibus habentur ac propterea distributiones pariter lucrantur." Quae statutorum praescripta in suis deductionibus Capitulum ita explicat: " A tale legge e consuetudine della presenza fisica richiesta in determinate funzioni sono pertanto in questa archidiocesi sottoposti, nonostante siano dispensati dall' intervento in coro, i seguenti: 1 ° i canonici eventualmente inviati dall' Ordinario *ad visitanda Limina*, i giubilati, dopo 40 anni di servizio, provveduti di apposito indulto, il teologo nei giorni di insegnamento etc., il penitenziere quando confessa, il canonico parroco etc."

Consuetudinem tandem quod spectat, hoc unum animadvertere praestat, in memorato Capitulo sexaginta abhinc annis nullum fuisse canonicum, qui iubilationis indultum a Sede Apostolica obtinuerit.

Cum quaestionem inter se capitulares componere nequissent, Archiepiscopus quaestionem ipsam huic Sacrae Congregationi dirimendam proposuit.

Animadversiones.—Praescriptum canonis 422 § 2 C. I. C. non videtur recte fuisse a Capitulo intellectum, ea praesertim de causa quia non bene animadvertisset distinctionem, iuxta Codicem, in distributiones quotidianas et distributiones inter praesentes. Ex quo factum est ut capitularibus iubilatis Capitulum denegasset ipsas quoque fallentias ex distributionibus quotidianis contra praescriptum canonis 395, vi cuius " distributiones quotidianae cedunt diligentibus "; quibus fictione iuris procul dubio accensendi sunt iubilati, quamvis choro non intersint. Quod sanxit haec Sacra Congre-

gatio in causa *Maioricen.* diei 15 Ianuarii 1921, in qua ad dubium: "An absentes a choro vi indulti apostolici quo conceduntur distributiones, amissis inter praesentes tantum, ius habeant ad fallentias in casu," respondit: "Affirmative, dummodo ne agatur de fallentiis e distributionibus inter praesentes tantum provenientibus." Quae decisio, quae infirmos spectabat apostolico indulto donatos, a fortiori applicanda esse videtur iubilatis, utpote potiore iuris favore fruentibus.

Quod vero pressius quaestionem spectat, Capitulum contendit in pluribus functionibus capitularibus requiri physicam canonicorum praesentiam, quamvis ipsi a choro sint dispensati, inter quos indiscriminatim enumerat canonicos accedentes vice Episcopi ad visitanda Limina Apostolorum, canonicos piis exercitiis vacantes, iubilatos, canonicum theologum nec non poenitentiarium, dum suis vacant officiis, aliosque. Et subdit: "Tutti questi, mentre sono dispensati dal coro, se occupati nei loro uffici, partecipando tuttavia alle distribuzione corali, non sono invece qui dispensati dall' intervento alle altre determinate funzioni, per le quali in questa diocesi in virtù del sinodo, degli statuti e di immemorabile consuetudine è richiesta la presenza fisica."

At plura in his sunt animadvertenda. Et in primis, recensiti canonici qui distributionibus inter praesentes privantur, omnes indiscriminatim assimilantur, quoad perceptionem harum distributionum, canonicis iubilatis, qui postremi singulari iuris favore gaudent, utpote qui ad normam citati canonis 422 § 2, licet a choro absentes, ius habent percipiendi distributiones inter praesentes, iis tantum exceptis quibus obstet expressa fundatorum vel oblatorum voluntas etc.

Revera memoratum indicem a synodo dioecesana diei 4 septembris 1877 fere ad literam Capitulum mutuavit, non advertens synodum in loco citato non agere de distributionibus inter praesentes sed de distributionibus quotidianis, uti patet quoque ex eodem titulo XXVII, qui inscribitur: *De quotidianis distributionis.*

Praeterea Capitulum in aliis deductionibus mentem suam hac in re ita clarius aperuit: "Nel nostro sinodo diocesano celebrato nel settembre 1877, al tit. 27 § 8, i giubilati sono considerati per le puntazioni come gl' infermi, come i canonici che assistono l'Arcivescovo ecc. Tali disposizioni del nostro sinodo sono state confermate dal nuovo statuto approvato in data 25 dicembre 1924," Quae praescripta tamen sunt contra ius commune a Codice firmatum in canone pluries citato, immo nullius sunt momenti, attenta quoque omis-

sione distinctionis, qua laborat argumentatio Capituli, inter distributiones quotidianas et inter praesentes.

Quibus attentis, liquido patet statuta Capituli cathedralis T., utpote contra ius commune, hoc caput quod spectat, concinnata, haberi non posse tamquam fontem iuris, vi cuius canonici iubilati priventur distributionibus inter praesentes, iis tantum exceptis de quibus in canone 422 § 2.

Resolutio.—Proposito itaque in Comitiis plenariis diei 14 Februarii 1942 dubio: *An iubilati ius habeant ad distributiones inter praesentes in casu;* Emi Patres huius Sacrae Congregationis responderunt: *Affirmative, nisi obstet expressa fundatorum vel oblatorum voluntas: cauto praeterea ut Capitulum T. hac in re propria statuta capitularia emendet ad normam Codicis iuris canonici.*

Quam resolutionem Sanctissimus Dominus noster Pius Pp. XII in Audientia diei 22 Februarii 1942, referente subscripto Secretario, approbare et confirmare dignatus est.

I. Bruno, *Secretarius.*

SACRA CONGREGATIO CONCILII ROMANA RESERVATIONUM APOSTOLICARUM

Die 12 Novembris 1942

Dataria Apostolica ea quae sequuntur huic Sacrae Congregationi Concilii exposuit: "In nonnullis Curiis dioecesanis plerumque fit ut, cum ad beneficium a Sede Apostolica conferendum aliquis proponatur, qui aliud beneficium iam possidet, primum is invitetur ad beneficium possessum resignandum, ac deinde beneficio antea possesso nunc expers Sanctae Sedi proponatur, persuasum habentes eaedem Curiae effugere hoc modo reservationem apostolicam de qua in canone 1435 § 1 n. 4: *Si Romanus Pontifex beneficiarium promoverit vel transtulerit* etc., instantes in literali eiusdem canonis significatione."

His tamen in adiunctis censet Dataria Apostolica haberi manuum appositionem Romani Pontificis, ideoque beneficii reservationem, quia renunciatio beneficii fit in fraudem reservationis apostolicae, atque uti nullius momenti sit habenda. (Cfr. Riganti, *Commentaria in Regulas Cancellariae Apostolicae,* nn. 1-5).

[2] *Acta Apostolicae Sedis,* XXXV (1943), 182.

Quapropter ratus Emus Cardinalis Datarius agi in casu de quaestione, cuius solutio uti norma a Curiis dioecesanis esset servanda, rem Summo Pontifici retulit, qui huic Sacrae Congregationi mandare dignatus est ut rem accurate perpenderet, eiusque decisio, uti norma servanda, Curiis dioecesanis communicaretur.

ANIMADVERSIONES.—Nullum est dubium quin in veteri iure prohiberentur, imo ut nullae haberentur renunciationes beneficiorum in fraudem reservationis apostolicae peractae, idque ex Const. *Iam dudum* Pauli V diei 25 februarii 1609. Ita Lotterius (*De re beneficiaria,* lib. II, q. 27, n. 38 ss.): "Cui reservationi, ut nulla fraus fiat ex Constitutione Pauli V . . . ., quae hodie est notata inter Regulas Cancellariae Apostolicae, cautum est ut si, vacante parochiali, aliquis resignaverit quam prius habebat et vacantem mox obtineat, resignatio sit nulla, et nihilominus, tamquam si per assecutionem vacasset, censeatur reservata." Nec aliter Pitonius (*Disceptationes ecclesiasticae,* disc. 12, n. 58 ss), Barbosa (*De officio et potestate Episcopi,* pars III, alleg. 57, n. 83) et tandem Riganti (l.c., in regulam tertiam, n. 2 et seq.), qui ad rem haec scribit: "Cum Summus Pontifex . . . sibi reservaret omnia beneficia vacatura per pacificam assecutionem quorumcumque beneficiorum incompatibilium a Sede Apostolica vel eius auctoritate providendorum, invaluit malitia quod ii qui de beneficiis incompatibilibus providendi erant, ante illorum assecutionem, resignabant vel dimittebant in fraudem apostolicae reservationis beneficia quae tunc obtinebant; hinc, ut huic malo occurreret, s.m. Paulus V . . . decrevit quod beneficia sic resignata ac dimissa . . . sub dicta reservatione comprehendantur . . . Sufficit quod resignatio beneficii fiat intra tempus vacationis et provisionis alterius incompatibilis, etiamsi bona fide et absque fraude imminentis reservationis expleta contendatur. Regula . . nullam fraudis probationem requirit . . . ; colligit enim fraudem ab eventu et vicinitate actuum, videlicet a scientia quam resignans habuit vacationis secundi beneficii incompatibilis, et ab illius assecutione post expletam resignationem alterius quod prius obtinebat."

Ex quibus hae praecipue colliguntur: fraudem in casu spectari *obiective,* praecisione nempe facta a malitia subiectiva vel a fraudolenta renunciantis intentione; praesumptionem huiusmodi fraudis haberi quando beneficiarius suo beneficio renuntiavit tempore vacationis alius beneficii reservati, et hoc assecutum est; his in adiunctis haberi eo ipso fraudem, quin de malitiosa resignantis voluntate inquirere opus sit.

His adnotatis, quaestio resolvenda in hoc vertitur, utrum iure quo utimur haec praescripta adhuc vigere dicenda sint. Iamvero canon 1435, § 1 n. 4 omnia beneficia reservata declarat, " quibus Romanus Pontifex per se vel per delegatum manus apposuit his qui sequuntur modis: *si...beneficiarium promoverit vel transtulerit, beneficio privaverit,* etc."

Equidem verba huius canonis legenti prima fronte videretur reservationem apostolicam non dari. Nam, posita renunciatione prioris beneficii Ordinario dioecesano legitime facta, ab eoque acceptata, actus videtur iuridice per se completus, atque manuum appositionem Romani Pontificis excludens, cum sacerdos ad beneficium reservatum promovendus vel transferendus, tempore vacationis huius beneficii, beneficio ab eo antea possesso sit expers. At ex his rei adiunctis facile patet resignationem beneficii intuitu alius beneficii reservati assequendi fieri in fraudem legis, quatenus per beneficii resignationem ponitur obex, cuius vi impeditur quominus Romanus Pontifex ius suum exerceat, et fraus et dolus, ex trito iuris praescripto, nemini prodesse debet.

Praeterea memoratus canon 1435 § 1 n. 4, reservationes in veteri iure statutas quoad substantiam et refert et confirmat, " ex veteris iuris auctoritate est aestimandus " ad normam canonis 6 n. 2 et 3; quod si dubium sit num " cum veteri iure discrepet, a veteri iure non est recedendum " (n. 4). Eo vel magis si recolatur constans in subiecta materia Datariae Apostolicae praxis, quae iuxta canonem 20 Codicis I. C. in casu uti *norma legis* sumi debet.

Quapropter et in novo iure resignatio beneficii in fraudem reservationis apostolicae prohibita est, atque beneficium ipsum reservatum manet.

Resolutio.—In plenariis autem comitiis diei 12 Decembris 1942 Emi Patres huius Sacrae Congregationis ad propositum dubium: *An, ad mentem canonis 1435 § 1 n. 4, collati cum canonibus 6 nn. 2-4 et 20 C. I. C., sit Apostolicae Sedi reservatum beneficium resignatum intuitu alterius beneficii reservati;* responderunt: *Affirmative.*

Quam resolutionem in Audientia diei 20 Decembris 1942, referente subscripto eiusdem Sacrae Congregationis Secretario, Sanctissimus Dominus Pius Pp. XII benigne approbare et confirmare dignatus est.

I. Bruno, *Secretarius.*[3]

[3] *Acta Apostolicae Sedis,* XXXV (1943), 148.

SACRA CONGREGATIO PRO ECCLESIA ORIENTALI

DECRETUM [4]

Formulam quamdam pro benedictione et impositione quinque Scapularium iuxta ritum byzantinum quidam Episcopi huius ritus ab Apostolica Sede condendam enixe postularunt.

Haec vero S. Congregatio, exquisito voto Consultorum in re liturgica peritorum, petitioni praelaudatorum Episcoporum satisfaciendum censuit ac novam formulam confecit, quam Ssmus D. N. Pius div. prov. PP. XII, in Audientia diei 27 m. Februarii a. 1943, referente infrascripto Cardinali a Secretis, apostolica sua auctoritate probare dignatus est, mandans ut in posterum haec formula unice adhibeatur in benedictione et impositione quinque Scapularium pro fidelibus ritus byzantini, quibus indulgentiae et privilegia sueta servantur.

Praesenti igitur Decreto Sacra haec Congregatio adnexam lingua latina exaratam formulam publici iuris facit, quam in probatas linguas liturgicas vertendam confestim ipsa curabit ad usum sacerdotum, qui debitam facultatem ab eadem S. Congregatione obtinuerint.

Contrariis quibuslibet minime obstantibus.

Datum Romae, ex Aedibus S. C. Pro Ecclesia Orientali, die 7 m. Aprilis anno 1943.

E. Card. Tisserant, *a Secretis.*

L. ✠ S. ✠ A. Arata, Archiep. tit. Sardian., *Adsessor.*

Ordo benedicendi et imponendi quinque Scapularia sub unica formula secundum ritum byzantinum.

Domine Deus, qui in Sanctissima Trinitate glorificaris et adoraris, exaudi nunc orationem nostram et demitte benedictionem tuam divinam coelestem et benedic et sanctifica scapularia (vel numismata) haec in laudem tuam, in memoriam sanctae venerandaeque Passionis et Mortis Domini Dei et Redemptoris nostri Iesu Christi, ad impetrandum perpetuum succursum Immaculatae Dominae et semper Virginis Mariae, cruci adstantis, quae in monte Carmelo misericordiam suam ostendit, impleque virtute tua et fortitudine, ut sint ad depellendas et corruendas omnes diabolicas insidias, omni autem fideli servo suo (servae tuae), eadem secum gestanti, effice, ut sint in protectionem animae et corporis, ad depellendos a facie

[4] *Acta Apostolicae Sedis*, XXXV (1943), 146.

inimicos eorum visibiles et invisibiles, in liberationem ab omni malo et in augmentum tuae gratiae.

Quoniam tu es santificatio nostra et tibi gloriam referimus Patri et Filio et Sancto Spiritui nunc et semper et in saecula saeculorum. Amen.

E. Card. Tisserant, *a Secretis.*

L. ✠ S. ✠ A. Arata, Archiep. tit. Sardian., *Adsessor.*

INDULGENCE FOR PRAYER TO THE MOST HOLY TRINITY

On February 9, 1943, the Sacred Penitentiary, Office on Indulgences, issued a decree in virtue of an audience held by the Cardinal Penitentiary Major on February 6 in which His Holiness granted a partial indulgence of three hundred days *toties quoties* for the recitation of the prayer, "*Sanctissima Trinitas, adoramus te et per Mariam rogamus te. Da omnibus unitatem in fide eamque fideliter confitendi animum,* and a plenary indulgence once a month for those who have recited the prayer daily during the month, under the usual conditions.[5]

DAY OF PRAYER

December 8th, the Feast of the Immaculate Conception, was designated by our Holy Father, Pope Pius XII, in a papal letter to Luigi Cardinal Maglione, Secretary of State, as a day of special prayer throughout the universal church for the coming of world peace.

CUSTODY OF THE BLESSED SACRAMENT

The Sacred Congregation of the Sacraments, in a new instruction regarding the custody of the Blessed Sacrament, provides that where churches and chapels are exposed to the danger of air raids, the Blessed Sacrament should be reserved in an underground shelter. Further it is urged that a fire and burglar-proof tabernacle be built into a wall. The priest should discontinue Mass if the alarm precedes the Consecration; otherwise, he consumes the Sacred Species at once. The Ordinaries are charged with discretion as to

[5] *Acta Apostolicae Sedis,* XXXV (1943), 92.

whether reservation may be permitted only where a priest or a deacon is available at all times to remove the Blessed Sacrament to a place of safety. The liturgical laws are to be observed with regard to the substitute tabernacle, and to the lamp and the use of olive oil or beeswax, though an electric light is permitted in an emergency. Receptacles for the reservation of the Sacred Hosts to be used in Holy Viaticum should be of stronger material than the ordinary pyx, and no more Hosts should be consecrated than are reasonably necessary to care for Holy Viaticum. Lay persons, preferably members of the Confraternity of the Blessed Sacrament, are to be instructed to carry the Blessed Sacrament to safety in the absence of the priest, and even to gather up the Sacred Hosts, should they be scattered.

BIBLICAL SCHOLARSHIP

On November 18th, the Church celebrated the fiftieth anniversary of the issuance of Pope Leo XIII's Encyclical, "*Providentissimus Deus*", fostering devotion to and study of the Holy Bible, and Pope Pius XII issued on September 30th an Encyclical, "*Divino Afflante Spiritu,*" commemorating the event. In it he reviews the progress of Scriptural study in the Church in the past fifty years and offers instruction for the full use of the fruit of that scholarship.

BEATIFICATION

The cause for the beatification of Venerable Pope Innocent XI (1676-1689) was reopened in October by the Sacred Congregation of Rites. The causes of three other Popes are also pending: Popes Benedict XIII, Pius IX, and Pius X.

SECULAR

Dispensation from Consent of Parent to Marriage of Minor Child

Chapter 295 of the Laws of New York, effective April 5, 1943, provides that the written consent of a parent, required for the marriage of a minor child, may be dispensed with when the parent is in the service of the United States and absent from the United

States, but only on the application of the minor child and the other parent; or if the latter be dead or the consent of the latter be unnecessary, then by the application of the minor child and of the person under whose care minor child has been placed. The authority competent to grant this dispensation is a justice of the superior court, a judge of a county court, or (in the case of a female minor between the ages of fourteen and sixteen) a judge of the children's court.

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Twenty-Four Hour Waiting Period Waived

The twenty-four hour waiting period required between the granting of a marriage license and the celebration of the marriage was waived by Chapter 731 of the Laws of New York, 1942, the waiver to extend till July 1, 1943. The period was extended by the Laws of 1943 till July 1, 1944.

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Growing Marihuana

Chapter 123 of the Laws of New York, effective March 18, 1943, (§ 1753 of the Penal Code) makes it a misdemeanor to grow marihuana or to permit it to grow.

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Incorporation of Eastern Orthodox Churches

The Laws of New York, effective March 20, 1943 (Article XVI of Religious Corporations Laws, §§ 290-296), contain new provisions for the incorporation of Orthodox Greek Catholic Churches.

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Sunday Liquor Laws

Chapter 339 of the Acts of North Carolina of 1943 forbids the sale of beer and wines from 11:30 Saturday night until 7:00 a. m. Monday. On other days, no sale after 11:30, no consumption after 12:00 M. County commissioners and municipal authorities are authorized to enforce. Violation constitutes a misdemeanor. Penalty is fifty dollars fine and/or thirty days imprisonment and automatic revocation of license.

Act 281 of the Acts of Arkansas of 1943, approved March 23, 1943, imposes a fine of fifty to one hundred dollars for the sale of

wine or beer on Sunday; for the second offense, besides the fine, revocation of license is imposed.

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Lottery

Chapter 550 of the Acts of North Carolina, ratified March 6, 1943, makes it a misdemeanor to conduct a numbers or butter and egg lottery. The penalty is fine or imprisonment in the discretion of the court.

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Sale of Contraceptives

Act 189 of the Acts of Arkansas 1943, approved March 10, 1943, provides that no drug or appliance for the prevention of conception or of venereal disease shall be advertised except in periodicals limited to physician and drug trade subscribers, or sold without a license from the State Board of Pharmacy, excepting physicians and medical practitioners licensed to practice in the State; when sold under license it must be under the supervision of a registered pharmacist. The State Board of Pharmacy may revoke the license for a violation of the law, and seize the license, display material, and vending machine. An appeal lies to the circuit court of the county where the business is located. Penalty is two hundred dollars fine, sixty days imprisonment, or both.

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Pandering

Act 240 of the Acts of Arkansas 1943, approved March 16, 1943, makes it a misdemeanor to pander, including the act of directing persons to brothels. Penalty is one hundred to two hundred and fifty dollars and three to six months in the county jail. For subsequent offense, the penalty is two hundred and fifty to five hundred dollars and six months to a year imprisonment. Penalty for the prostitute is fifty to one hundred dollars and thirty days to three months imprisonment; for subsequent offense, the same as for first offense of panderer.

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Obscene Literature

Chapter 152 of the Acts of Kansas 1943 makes it a misdemeanor to sell or distribute, or to possess for sale or distribution, periodicals

(not newspapers) which have not been admitted to United States mailing privileges. And the absence of notice of mailing privilege in the periodical is *prima facie* evidence that periodical has not been admitted. Penalty is fifty dollars and/or thirty days' imprisonment.

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Pre-natal Blood Test

Chapter 225 of the Acts of Kansas 1943, approved March 22, 1943, requires that fourteen days after a diagnosis of pregnancy a sample of blood is to be tested for syphilis. Failure is a misdemeanor. Penalty is a fine of ten to one hundred dollars.

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A bill introduced into the House of Representatives of the United States by Representative Walter A. Lynch, of New York, would place lay employes of tax-exempt agencies among the beneficiaries of Social Security funds; contributions from such agencies and their employes would be one-half per cent lower than the rate for those now covered, and would be kept in a separate fund.

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The United States Senate has voted 53 to 26 to recommit to the Committee on Education and Labor the Thomas Bill providing federal subsidies of $300,000,000.00 to schools. The bill contained a threat of federalization of the entire educational system of the country.

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Representative Carl T. Curtis, of Nebraska, is sponsoring a proposal to have contributions to religious, charitable and educational institutions deducted from income available for taxation under the pay-as-you-go income tax deduction from wages at their source. The proposal is supported by the Education Department of the National Catholic Welfare Conference, the Jesuit Educational Association, and the Golden Rule Foundation.

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Most Rev. Paul Yu-pin, Vicar Apostolic of Nanking, China, appeared before the House and Senate Committees of Congress, urging the repeal of the Chinese exclusion act. The House has passed the bill repealing the act; the Senate bill is pending before the Senate Immigration Committee.

The State Department of Education, New York, has compelled a local district school board in Albany to provide transportation to parochial school children to ride in the free bus provided by the district.

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The New Jersey statute of 1941 requiring boards of education to provide transportation for pupils attending parochial and non-profit schools on the same basis as it is provided for pupils attending public schools has been brought before the Supreme Court of the State on a taxpayer's suit.

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State Education Commissioner Bossart of New Jersey has ruled that no longer may children be compelled to salute the flag as part of school exercises and that children expelled in the past for refusal must be readmitted. A similar ruling has been made in Florida, though it is held there that those not saluting the flag must stand at attention while the others do.

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Attorney General J. A. Burnquist of Minnesota has ruled that under the Constitution of the State a school board can not rent unused space in public schools for religious instruction during the regular school year.

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Attorney General Robert T. Bushnell of Boston has ruled that the distribution by State agencies of *Federal* funds for meals supplied free to parochial school children is not contrary to the "anti-aid amendment" of the State Constitution.

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The Court of Appeals of Kentucky has ruled that money pledges made to religious and charitable organizations are unenforceable as lacking valuable consideration.

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Kentucky's Assistant Attorney General refuses to reconsider an opinion that conscientious objectors can not be employed as public school teachers in that State.

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Recent regulations making selective service in Canada less indulgent permits nevertheless the postponement of the service of *bona*

fide candidates or students for the ministry certified as such by the proper ecclesiastical authority.

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The Attorney General of Mexico has announced that the federal agent in Vera Cruz has been instructed to proceed against persons accused of conducting processions and other acts of external adoration.

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The Mexican Senate has tabled a bill from the Socialist bloc from the State of Yucatan proposing an amendment to the Federal Constitution making marriage obligatory for ministers of any religious denomination.

Reviews

BOOKS

THE EXEMPTION OF RELIGIOUS IN CHURCH LAW. By Joseph D. O'Brien, S.J., S.T.D., J.C.D. Milwaukee: The Bruce Publishing Company. Pp. xvii, 307.

The volume produced by Doctor O'Brien is a welcome addition to the literature of Canon Law. There is a definite need for an extensive treatise on the exemption of Religious. The privilege of exemption is something which has multiple application, and it is necessary to know in detail where and how this privilege can be used. Not only are the Religious themselves anxious to be aware of their rights according to this privilege but the diocesan curias are equally interested to learn what jurisdiction the local Ordinary may exercise over exempt Religious. Doctor O'Brien's work will answer most questions.

The volume under review begins with two chapters on preliminary notions. After this introduction the remaining parts of the volume are given over to a consideration of the jurisdiction over exempt Religious, to the extension of exemption and to the limitations of exemption. Every one of these parts is suitably divided. In the section devoted to jurisdiction over exempt Religious not much is said of the local Ordinary's jurisdiction. This consideration is placed under the title indicating the limitations of exemption. This arrangement is logical if one admits the fundamental equality of the jurisdiction exercised by Religious Superiors and the local Ordinary.

The chapters dealing with the extension of exemption are particularly well done. The usual divisions are adequately outlined, and the details are given in brief but clear language. These chapters, as well as the rest of the book, are sufficiently annotated.

Some criticism, however, may be offered regarding the broad or strict interpretation of the privilege of exemption. Doctor O'Brien maintains that this privilege should receive a broad interpretation. In support of this contention the author proposes various reasons (cf. pp. 15, 16). These reasons are not immediately deduced from

public ecclesiastical law. Yet, it is in such law that the idea of jurisdiction, local or personal, must be found. There is no denying that tradition has given exemption a broad interpretation, but one wonders whether this has not been due to the neglect of public ecclesiastical law as a treatise separate from the study of canons, ancient and modern.

Another point. While the discussion of the text of pertinent canons is adequate, comparatively little historical data is actually introduced into the commentary. This data is not ignored. There are times when a few sentences or even paragraphs are devoted to the development of exemption. Much more would be of use to students who now in reading this volume must examine the footnotes to obtain information. This criticism is not urged too strongly, for the author's intention was rather to explain canonical provisions than to expatiate on the development of exemption. Students of Canon Law, however, will regret a lost opportunity.

Doctor O'Brien's volume should be in the hands of all who have any practical acquaintance with the problems of jurisdiction. This work can be consulted frequently with reasonable hope that a satisfactory solution of problems will be found.

A good bibliography is prefixed to the text of this work. Two useful indices bring it to a close.

EDWARD ROELKER

AN ESSAY ON THE NATURE OF REAL PROPERTY IN THE CLASSICAL WORLD. By Angelo Segrè. New York: Paul Bassinor, Publisher. Pp. 143.

This essay exists at present in mimeograph form. Many Greek insertions occur in the text. While great care was undoubtedly used in preparing the manuscript for publication in this form, it none the less suffers from the defects of most work of this character.

The essay of Angelo Segrè considers mostly the conveyance of property in the classical world. While this is not properly the title of his work, it is through the discussion of conveyance of property that the author develops his ideas on the actual nature of property. Both the Greek and the Roman world are sufficiently examined for indications of the nature of real property. Doctor Segrè supports his own views with adequate footnotes which are placed at the end of each separate part of his essay.

The subject of this essay will scarcely appeal to the general reader. Much profit, however, could be had from a reading of the pages which show that citizens in the classical world were owners of their property. For students of Greece and Rome and for students specializing in the development of the law regarding property, this essay of Doctor Segrè will be a stimulating experience. Discussions of conflicting opinions are fairly and sufficiently made.

It is to be regretted that no separate bibliography is attached to this essay. There is no index at all.

EDWARD ROELKER

PERIODICALS

PHILOSOPHY OF LAW AND GOVERNMENT

S. Castillo "La ley meramente penal y la legislación eclesiástica"—*Ciencia Tomista*, LXIV (1943), 26-45 (shows that *leges mere poenales*, while they are to be found in particular law, especially in the statutes of religious congregations, are not extant in universal canon law; possible objections based upon cans. 132, § 2; 136, § 3; 141; 188, n. 6; 1469, § 3; 2200, § 2; 2222, § 2; 2307, are refuted in detail).

J. Viñas Planas, "El arbitraje internacional en los escolásticos españoles"—*ibid.*, 145-174 (continued; cf. THE JURIST, III [1943], 509).

J. Menéndez-Reigada, "La teoría penalista de Santo Tomas"—*ibid.*, 273-292.

G. Leibholz, "The Foundations of Justice and Law in the Light of the Present European Crisis"—*Dublin Review*, CVII (1943), 32-50 (the Lutheran author, rejecting the typical Lutheran attitude toward Law, Justice, and the State, develops a theory which in many points comes close to the teaching of the social encyclicals of the recent Popes).

J. Kelly, "The Pope's Peace Plan"—*Ecclesiastical Review*, CIX (1943), 16-23.

F. J. Zwierlein, "Thomas Jefferson and Freedom of Religion"—*ibid.*, 39-58.[1]

D. A. McLean, "Global Ethics and Global Peace"—*ibid.*, 161-178 (with special reference to a future world society of nations and its organization).

D. J. Cannon, "Thoughts on the Conditions of a Durable Peace"—*Irish Ecclesiastical Record*, 5, LXII (1943), 199-207.

J. Azpiazu, "Rutas de paz: el último mensaje pontificio"—*Razón y Fe*, CXXVII (1943), 293-312 (on the Pope's Christmas allocution of 1942 and the foundations of peace).

M. Adler and W. Farrell, "The Theory of Democracy"—*The Thomist*, VI (1943), 367-407 (continued).

NORMAE GENERALES

J. P. Donovan, "The Story of Standard Time"—*Homiletic and Pastoral Review*, XLIII (1943), 990-995 (former standard time cannot be followed instead of war time).

[1] On this subject, see Dr. Plöchl's article in THE JURIST, III (1943), 182-230.

Clerics—Pastors—Parishes

J. K. Shryock, "The Distinctive Dress of the Clergy"—*Anglican Theological Review*, XXV (1943), 374-388 (after a brief historical review of Catholic legislation and of Anglican rules, the author discusses arguments for and against a distinctive clerical garb).

Cônego (Canon) Medeiros, "Vigário Cooperador"—*Revista Eclesiástica Brasileira*, III (1943), 137-143 (on the parochial assistant's faculties with regard to assistance at marriage, and on pertinent legislation of the Plenary Council of Brazil, decr. 295).[2]

Frei B. Mueller, "O fichário paroquial"—*ibid.*, 334-344 (on card files for parishes).

F. Gilles, "Os religiosos e as paróquias"—*ibid.*, 370-403 (continued; cf. The Jurist, II [1942], 315; III [1943], 510).

Religious

C. Piontek, "Choir Duties and Conventual Mass in Religious Communities"—*Homiletic and Pastoral Review*, XLIII (1943), 925-931 (concluded; cf. The Jurist, III [1943], 511).

A. C. Ellis, "Studies During the Novitiate"—*Review for Religious*, II (1943), 255-262.

Frei Aleixo, "Confissão frequente ou semanal de religiosos e clérigos"—*Rev. Ecl. Bras.*, III (1943), 123-131 (on the several canonical obligations of clerics and religious concerning frequent or weekly confession).

Sacraments

J. McCarthy, "Repetition of the Sacraments of Baptism and Extreme Unction"—*Irish Ecclesiastical Record*, 5, LXI (1943), 263-267.

Marriage

J. P. Donovan, "Emergency Sanations?"—*Homil. Past. Rev.*, XLIII (1943), 1057-1062 (may can. 1043 include the power of the local ordinary to grant a *sanatio in radice* in danger of death, contrary to the common canon law?).

J. McCarthy, "The Meaning of Marriage—a Recent Theory"—*Ir. Eccl. Rec.*, 5, LXI (1943), 408-414 (observations on the theory of H. Doms; cf. The Jurist, III [1943], 163).

Frei Aleixo, "Assistência ao matrimônio segundo o cânon 1098"—*Rev. Ecl. Bras.*, III (1943), 446-452.

Sacred Vessels

J. E. Risk, "The Handling of Sacred Vessels and Linens"—*Review for Religious*, II (1943), 307-311.

Magisterium

F. J. Connell, "Pope Leo XIII's Message to America"—*Ecclesiastical Review*, CIX (1943), 249-256 (on Leo XIII's apostolic letter, September 18, 1895,

[2] This article was written before the recent response of the Commission for the Interpretation of the Code, January 31, 1942 (*AAS*, XXXIV, 50).

against participation of Catholics in interfaith assemblies discussing religion and morals; on the dangers of indifferentism today, with special regard to the battle fronts and to "freedom of worship": the Church can admit this freedom for non-Catholics only as a subjective right of the erroneous conscience).

W. Parsons, "Intercredal Co-operation in the Papal Documents"—*Theological Studies*, IV (1943), 159-182 (contrasts the failure in America to follow the papal command, to unite with non-Catholics in the secular field, with the accomplishments of British Catholics).

J. C. Murray, "Intercredal Co-operation: Its Theory and Its Organization"—*ibid.*, 257-286 (see also the letter of Ambassador Carlton Hayes to the Editor, pp. 314-316).

Temporal Goods—Taxes

C. Piontek, "Pennies Collections and Other Free-Will Offerings in the Code of Canon Law"—*Eccles. Rev.*, CIX (1943), 190-199; 272-279 (on the American system of church support; on the substantial agreement of the pertinent decrees of the Second and the Third Plenary Council of Baltimore [nn. 182-204 and 264-296 respectively] with the Code; to be continued).

E. A. Keller, "The Exemption of Religious and Educational Institutions"—*Homil. Past. Rev.*, XLIII (1943), 865-877.

J. P. Donovan, "Taxing Mass Stipends or Offerings by Legacy"—*ibid.*, XLIV (1943), 98-101.

History of Canon Law

R. M. Honig, "The Nicene Faith and the Legislation of the Early Byzantine Emperors"—*Anglican Theological Review*, XXV (1943), 304-323 (studies the ecclesiastical policy of the emperors of the fourth century, in particular the aspirations of Theodosius I as a self-made "supreme governor" of the Church; examines the chronological relations of *Cod. Th.* 16, 5, 6 and 16, 1, 3 to the Council of Constantinople, 381).

W. Telfer, "The Codex Verona LX (58)"—*Harvard Theological Review*, XXXVI (1943), 169-246 (a critical analysis of the much discussed MS; according to the author, the canonical collection contained therein goes ultimately back to an accumulation, in the episcopal *scrinium* [chancery] of Carthage during the fifth century, of papers connected with the differences between Rome and Africa, i. e. with the affair of Apiarius [419 A. D.] and the canons of Sardica,[3] etc.; these papers came to Italy in the sixth century, perhaps to the library of Cassiodorus, where they became enriched with materials from the Dionysian collection; the MS of Verona is probably a copy of this mixed Codex. Valuable "additional notes" on modern research in the ancient collections, on the "Isidorian" version of the Councils, on the Apostolic canons, on the Chapter Library of Verona, etc., are appended).

U. Dominguez, "El candidato al sacerdocio en los concilios de Toledo"—*Ciudad de Dios*, CLV (1943), 261-290 (reports on the legislation concerning the admission to the priesthood in Visigothic Spain).

[3] The author exaggerates however, as before him Turner and E. Schwartz, the degree and significance of African opposition against the papal "claims" of supreme jurisdiction.

F. Dvornik, "East and West — The Photian Schism: A Restatement of Facts"—*The Month*, CLXXIX (1943), 257-270 (a summary preview of the author's forthcoming book on Photius; evidence will be offered for a new appraisal of the causes of the Photian schism; the author believes that in many points the traditional western opinion on Photius must be revised in a more favorable sense, particularly in view of the fact that Pope Nicholas I originally approved of the acts of the Synod of 861 and excommunicated Photius later primarily on account of the Bulgarian missions).

Dom Th. Richardson, "The Monastic Profession and Career of St. Gregory VII"—*Dublin Review*, CVII (1943), 154-163 (examining the extant sources in the light of recent controversies over Gregory VII's monastic profession, the author concludes that Hildebrand had been since his boyhood a monk at St. Mary's on the Aventine; that he had received part of his training at Cluny; that he was taken from his monastery by Gregory VI to serve the Roman Church; that during his exile with the latter he tried to enter a monastery in the North, perhaps in the Rhineland, perhaps in Cluny; and that after his return to Rome he became abbot of St. Paul's[4]).

R. A. L. Smith, "The Place of Gundulf in the Anglo-Norman Church"—*English Historical Review*, LVIII (1943), 257-272 (describes the interesting position which Gundulf, a close friend of Archbishop Lanfranc, held as Bishop of Rochester, 1077-1108: Lanfranc transformed the see of Rochester into a "proprietary church" of Canterbury, and Gundulf served as his *chorepiscopus* and auxiliary in the Archdiocese; until 1238 the Archbishop of Canterbury had the right to appoint the Bishop of Rochester *tanquam proprium cappellanum*).

G. Post, "Roman Law and Early Representation in Spain and Italy"—*Speculum*, XVIII (1943), 211-232 (examines the development of corporate representation by proctors, from the last third of the twelfth century through the thirteenth, in church councils and political assemblies, and its relation to the roman and canonical doctrine of *procuratores* which was taking shape at that time).

F. M. Powicke, "Master Simon the Norman" — *Engl. Hist. Rev.*, LVIII (1943), 330-343 (traces the career of the master of canon law and royal clerk Simon of Etelan, *fl. c.* 1230-1240, and his role as agent for King Henry III in the election cases of Winchester, Norwich, and Durham).

Rosalind Hill, "Bishop Sutton and the Institution of Heads of Religious Houses in the Diocese of Lincoln"—*ibid.*, 201-209 (describes the control exercised by Bishop Sutton, 1280-1299, over elections, postulations and presentations of abbots and priors in his diocese, from manuscript rolls in the Lincoln Record Office, and studies the relations of the several decisions of the bishop to the canons of the Second Council of Lyons, 1274).

S. H. Steinberg, "A French Version of Duranti's Prescriptions on the Presentation of Papal Bulls"—*Transactions of the Bibliographical Society*, New Series, XXIII (1942), 84-89 (describes a brief instruction in French, fifteenth century, for scribes of official documents, and contends [without sufficient

[4] The reviewer does not agree with the author's contention that Hildebrand's office as *oeconomus* and *rector* of St. Paul's implied abbatial rank.

proof, *Rev.*] that it is based on the relative section of William Duranti's *Speculum iudiciale*).

E. G. Schwiebert, "The Medieval Pattern in Luther's Views of the State"—*Church History*, XII (1943), 98-117 (maintains that Luther's views on the relation between State and Church were basically the same as those of the late Middle Ages; "only [*sic*] in his definition of the Church has Martin Luther made a fundamental change").

W. D. O'Donnell, "The Cahil Propositions, 1629"—*Irish Ecclesiastical Record*, 5, LXII (1943), 118-123 (studies the false accusations brought forward by the secular priest Patrick Cahil against the Irish Regulars to whom he maliciously imputed eleven heretical propositions concerning the *ius publicum* of the Church).

T. Urdánoz, "La Catolicidad en las leyes de Indias"—*Ciencia Tomista*, LXIV (1943), 347-351 (on the Catholic note in the Spanish colonial legislation).

J. M. Lenhart, "The Capuchin Prefecture of New England (1630-1656)"—*Franciscan Studies*, III (1943), 21-46; 180-195; 306-313.

E. J. Murphy, "Early Missionary Enterprise in China"—*The Month*, CLXXIX (1943), 222-224 (reviews a bundle of letters by Jesuit missionaries, *c.* 1701, and other documents of the time now on exhibition at the Bodleian Library in Oxford).

Stephan Kuttner

The Catholic University of America

Chronicle

GENERAL

A hundred members of the Hierarchy attended the annual meeting of the Archbishops and Bishops of the United States at Washington, November 10-13. Most Rev. Edward Mooney, D.D., Archbishop of Detroit, was reelected Chairman of the Administrative Board of the National Catholic Welfare Conference; Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, was named Vice Chairman and Treasurer; Most Rev. Francis J. Spellman, D.D., Archbishop of New York, Secretary; Most Rev. John T. McNicholas, D.D., Archbishop of Cincinnati, Chairman of the Education Department; Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans, Chairman of the Legal Department; Most Rev. John Gregory Murray, D.D., Archbishop of St. Paul, Chairman of the Press Department; Most Rev. John J. Mitty, D.D., Archbishop of San Francisco, Chairman of the Department of Catholic Action Study; Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, Chairman of the Department of Lay Organizations; Most Rev. Karl J. Alter, D.D., Bishop of Toledo, Chairman of the Department of Social Action; and Most Rev. James H. Ryan, D.D., Bishop of Omaha, Chairman of the Youth Department. Assistant to the Chairmen of the various Departments, the following Bishops were invited to serve: Most Rev. Thomas K. Gorman, D.D., Bishop of Reno, Press; Most Rev. John B. Peterson, D.D., Bishop of Manchester, Education; Most Rev. Emmet M. Walsh D.D., Bishop of Charleston, Lay Organizations; Most Rev. John F. O'Hara, C.S.C., D.D., Military Delegate, Catholic Action Study; Most Rev. Charles H. LeBlond, D.D., Bishop of St. Joseph, Social Action; Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg, Legal; Most Rev. Richard O. Gerow, D.D., Bishop of Natchez, Youth; and Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago, was named Assistant Treasurer. Rt. Rev. Msgr. Michael J. Ready was appointed General Secretary; Very Rev. Msgr. Howard J. Carroll, Assistant General Secretary; and Rev. James Lawler, Assistant to the General Secretary.

Most Rev. James E. Kearney, D.D., Bishop of Rochester and Most Rev. Francis P. Keough, D.D., Bishop of Providence, were elected to the Board of Trustees of The Catholic University of America.

Retiring after the expiration of the period fixed for service on the various committees were Most Rev. John G. Murray, D.D., Archbishop of St. Paul, from the Bishops' Committee on the Confraternity of Christian Doctrine, succeeded by Most Rev. Gerald P. O'Hara, D.D., Bishop of Savannah-Atlanta; Most Rev. John T. McNicholas, D.D., Archbishop of Cincinnati, from the Committee on Motion Pictures, succeeded by Most Rev. Joseph H. Albers, D.D., Bishop of Lansing; Most Rev. Francis J. L. Beckman, D.D., Archbishop of Dubuque, from the Committee on the Propagation of the Faith, succeeded

by Most Rev. John G. Murray, D.D., Archbishop of St. Paul; Most Rev. John J. Mitty, D.D., Archbishop of San Francisco, Committee on the North American College, succeeded by Most Rev. John J. Cantwell, D.D., Archbishop of Los Angeles; Most Rev. Edmund F. Gibbons, D.D., Bishop of Albany, from the Committee on Decency in Literature, succeeded by Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland; while Most Rev. Edward V. Byrne, D.D., Archbishop of Santa Fe, succeeded the late Most Rev. Rudolph A. Gerken, D.D., on the Committee on the Montezuma Seminary.

The Hierarchy issued a statement insisting that the coming peace must avoid every compromise with evil, lest the principles of the Atlantic Charter be sacrified; that lasting world peace requires a recognition of the sovereignty of God and of the moral law; that the Moscow pact, while opening the way for cooperation among the nations, a desirable thing, also left room for apprehension lest abandonment of the principles of the Atlantic Charter might not be beyond contemplation; that family rights and family dignity are paramount to the rights of the State; that "planned parenthood" weakens the physical and moral fiber of the nation; and that racial tensions must be relieved by according constitutional rights to all citizens, regardless of color or nationality.

Most Rev. Edward Mooney, D.D., Archbishop of Detroit, in submitting the annual report of the Administrative Board of the National Catholic Welfare Conference to the Hierarchy, adverted to the numerous problems facing the Church in America as a result of the war: taxation, man-power, divorce, broken homes, juvenile delinquency (sourced in wider employment of women, easy money, boomtown living), the birth control program. The report indicated that the Family Life Bureau had labored strenuously in disseminating Catholic teaching on the family. It pointed to other general activity of the Council: the cooperation with the Federal Government in fostering the spiritual and moral welfare of Catholics in the service; the sponsoring of the Latin-American Seminar; and the re-publication of the *Acta Apostolicae Sedis*. It adverted to the grief experienced over the bombing of Rome.

The Education Department reported new problems arising out of the need for care of children under school age, the post-war educational needs, and the extension of the accelerated system into the high schools and the grades. The Press Department reported an increase of twenty-one subscribers, making the total two hundred four; the competent functioning of the Spanish-language service, *Noticias Catolicas;* the steps taken for the establishment of a Portuguese-language service; and the complete coverage of Vatican war-time thought and activity. The Department of Lay Organizations reported the continuation of the Catholic Hour through its thirteenth year, the commencing of a new broadcast, "The Hour of Faith" on the Blue Network, and the taking over of the Narberth Plan by the National Council of Catholic Men. The Department of Social Action reported four regional industrial conferences, in addition to constant activity for social and racial betterment, including a four-year course for seminary study clubs in industrial relations. The Legal Department reported the bringing of two hospital Sisters for training in hospitals here from every Latin-American Republic and the providing of Mass wine for the priests of Martinique as well as efforts to provide aid in vocation rehabilitation to those desiring to attend denominatonal schools. The Board

of Immigration reported the aiding of 61,621 persons. The Confraternity of Christian Doctrine distributed 1,741,661 pieces of literature, exclusive of 222,389 pieces given to CCD groups. It also arranged the appointment of directors in various districts, and there are one hundred and seven. Catechetical Sunday was observed in thirty-two dioceses. The Youth Department reported constant contact with the Federal Government on youth problems, as well as financial aid to chaplains working with trainees on the campuses of secular schools, the recognition of The Camp Fire Girls, and a congress of college and university students.

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The 38th annual meeting of The Catholic Church Extension was held in Chicago in November, with its Chancellor, Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, presiding. Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago, President since 1934, reported financial aid to the missions during the past year in excess on $800,000.00. Most Rev. Francis C. Kelley, D.D., Bishop of Oklahoma City and Tulsa, Vice Chancellor, was prevented from attending because of illness.

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The American Board of Catholic Missions, meeting in Chicago, under the presidency of its Chairman, Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, reported that its income for the year was $701,000.00, of which $602,000.00 had been allocated chiefly to missionary activity among Mexicans, Indians, and Negroes, and largely through the various diocesan missionary offices.

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The Hierarchy of the United States through the National Catholic Welfare Conference, in a letter issued at Thanksgiving and sent to the Senate Foreign Relations Committee, expressed itself as favoring the sending of food to the starving people of the Nazi-occupied countries, indicating at the same time the efforts, including financial aid, which it had made in this direction, particularly by cooperating with agencies of the Holy See.

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A "Declaration of World Peace" was issued jointly in mid-October by Catholic, Protestant, and Jewish leaders, insisting on the moral law as the supreme authority of all nations and on the necessity of the application of this law to post-war problems.

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In early October, the Bishops' War Emergency and Relief Committee, meeting in Chicago, offered Pope Pius XII $350,000.00 for distribution among all distressed peoples. They received a report from Very Rev. Msgr. Patrick A. O'Boyle, Executive Director of the National Catholic Welfare Conference's War Relief Services. The report indicated that representatives are being assigned to work among exiled Poles in Mexico and the Middle East, and that other representatives will be sent to London, Lisbon, and Algiers. Rev. Aloysius J. Wycislo, of Chicago, has been sent to the Middle East to establish welfare centers for Polish refugees.

Most Rev. John J. Mitty, D.D., Archbishop of San Francisco, presided over the meeting of the trustees of the Chaplains' Aid Association, held in New York, in mid-November. The report indicated that donations to the Association included $110,760.00 from the Bishops' War Emergency and Relief Committee, and 130 sacred vessels from the Bishops of the United States. The Knights of Columbus of New York State had been of great assistance. $322,-356.00 were expended. 1355 Mass kits and 241 Benediction sets had been supplied the commissioned and auxiliary chaplains of the armed forces; and some to priest prisoners-of-war.

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Seventy-five members of the Hierarchy assisted Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, when on Sunday, November 14th, he celebrated Pontifical Mass celebrating the centenary of the founding of the diocese. The sermon was preached by Most Rev. Francis J. Magner, D.D., Bishop of Marquette. The Most Reverend Archbishop dedicated his Archdiocese to the Sacred Heart.

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Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, and formerly Archbishop of Milwaukee, offered a Pontifical Mass in St. John's Cathedral, Milwaukee, opening a five-day centennial celebration commemorating the establishment of the Diocese.

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On October 25th, Most Rev. Hugh C. Boyle, D.D., Bishop of Pittsburgh, celebrated Pontifical Mass, commemorating the hundredth anniversary of the founding of the diocese.

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Enrico Galeazzi, Special Delegate of the Pontifical Commission for Vatican City, visited the United States in September on matters concerning the financial administration of the Commission.

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A new Catholic daily is reported planned for Rome. The editor is said to be Signor de Gasperi, a prime mover in the *Partito Popolare;* and the political editor, Prof. Guido Gonella of the *Osservatore Romano.*

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His Eminence, Emmanuel Celestine Cardinal Suhard, Archbishop of Paris, is reported to have refused the post of premier at Vichy, as successor to Marshal Petain.

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"Action This Day" is the title of a book composed of the letters of Most Rev. Francis J. Spellman, D.D., Archbishop of New York, to his father during the six-months' period of his travels visiting the chaplains serving abroad with the fighting forces of the United States.

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In the presence of the members of the Hierarchy of the Province of San Antonio, Most Rev. Christopher E. Byrne, D.D., Bishop of Galveston, celebrated the silver jubilee of his consecration. He was consecrated November 10, 1918. The sermon of the occasion was delivered by Most Rev. Robert E. Lucey, D.D., Archbishop of San Antonio.

Most Rev. Richard E. Kearney, D.D., Bishop of Rochester, has celebrated the thirty-fifth anniversary of his ordination.

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On October 25th, Most Rev. James H. Ryan, D.D., Bishop of Omaha, celebrated the tenth anniversay of his consecration.

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October 24th was celebrated as Mission Sunday in the Dioceses throughout the world.

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A Catholic Rural Life Meeting, in place of the annual convention, was held in Milwaukee, October 9-13. Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, gave his presidential address on October 12th.

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The 28th semi-annual meeting of the School Superintendents' Department of the National Catholic Educational Association met in Pittsburgh early in November. Very Rev. Msgr. D. F. Cunningham, of Chicago, was elected President, succeeding Rev. James T. O'Dowd, of San Francisco.

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A three-day conference of liturgists from various sections of the country met in Chicago in mid-October, considering particularly Pope Pius XII's Encyclical, "*Mystici Corporis*".

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A national meeting of diocesan directors of the Confraternity of Christian Doctrine was held at Holy Cross, Indiana. It endorsed the released time plan for religious instruction.

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Rt. Rev. Procopius Neuzil, O.S.B., D.D., Abbot of St. Procopius' Abbey, Lisle, Illinois, states that the Abbey is training members of the Greek Slavonic Rite for missionary work in Russia, and that four priests thus trained will be ready to undertake the work when the war comes to an end.

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James J. Norris, Executive Director of the National Catholic Community Service, reports that the organization is serving the armed forces in 450 operations in 46 states.

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His Eminence, Vincenzo Cardinal La Puma is dead at the age of 70. He was created Cardinal December 16, 1935, after serving for many years in the Sacred Congregation of Religious and as Secretary of the Sacred Congregation from 1925 to 1935.

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His Eminence, Cardinal Francisco Vidal y Barraquer, Archbishop of Tarragona, died in Fribourg, Switzerland, at the age of 74. He had been Archbishop thirty-two years and Cardinal, twenty-two.

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His Eminence, Carlo Cardinal Cremonesi, died November 25, at the age of 77.

Most Rev. Jose Maiztegui, C.M.F., Archbishop of Panama for the last ten years, is dead at the age of 65.

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Most Rev. Michael J. O'Brien, D.D., fourth Archbishop of Kingston, Canada, died at the age of 69.

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Very Rev. Anthony F. Makowski, J.C.D., *Officialis* of the Archdiocese of Milwaukee, died in his rectory at Cedarburg, Michigan.

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Funeral services for John C. Cudahy, former United States envoy to Ireland, Poland, Belgium, and Luxembourg, were conducted by Most Rev. William P. O'Connor, D.D., Bishop of Superior, in St. Robert's Church, Milwaukee. Mr. Cudahy was 55 years old and was killed when thrown from a horse.

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Rt. Rev. Msgr. Michael J. Ready, General Secretary of the National Catholic Welfare Conference, celebrated in St. Matthew's Cathedral, Washington, D. C., the funeral Mass of Agnes Regan, first executive secretary of the National Council of Catholic Women, a position she resigned in 1941 after twenty-one years of service. In 1933 she had received from Pope Pius XI the Papal Medal *Pro Ecclesia et Pontifice*. The eulogy was given by Rt. Rev. Msgr. John A. Ryan, D.D.

UNIVERSITY

Right Reverend Monsignor McCormick, Ph.D., was inaugurated Rector of The Catholic University of America on Tuesday, November 9th. The Order of Exercises was as follows:

1. PROCESSIONAL .....2517 Service Unit (AST) Band
2. INVOCATION .....Most Rev. John J. Glennon, D.D., *Archbishop of St. Louis*
3. DECREE OF APPOINTMENT .....Most Rev. Amleto Giovanni Cicognani, D.D., *Apostolic Delegate*
4. ADDRESS .....Most Rev. Michael J. Curley, D.D., *Chancellor*
5. *Confirma Hoc Deus* (Handl) .....The University Choir
6. PRESENTATION of Honorable Victor Andrés Belaúnde, Vice Rector of the Catholic University of Peru, for the degree, Doctor of Laws, *honoris causa* .....Rt. Rev. Edward B. Jordan, S.T.D., *Vice Rector*
7. CONFERRING OF DEGREE .....Most Rev. Michael J. Curley, D.D., *Chancellor*

8. Inaugural Address .....Rt. Rev. Patrick J. McCormick, Ph.D., *Rector*

9. Hallelujah Chorus (Beethoven)...The University Choir

10. Greetings: In behalf of the Clerical Alumni .....Most Rev. James E. Kearney, D.D., *Bishop of Rochester*

In behalf of the Lay Alumni .....Mr. Andrew P. Maloney, A.B., '28, *President, Alumni Association*

11. The Star Spangled Banner .....The University Choir and Assembly

12. Benediction .....Most Rev. John Gregory Murray, D.D., *Archbishop of St. Paul*

13. Recessional .....2517 Service Unit (AST) Band

DIGNITIES

On September 23rd, Most Rev. Edwin V. Byrne, D.D., was installed eighth Archbishop of Santa Fe in St. Francis Cathedral by Most Rev. Robert E. Lucey, D.D., Archbishop of San Antonio.

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On November 25th, Most Rev. James P. Davis, D.D., Bishop of San Juan, Puerto Rico, was installed in his See. He had been consecrated October 6th, in San Augustin Cathedral, Tucson, Arizona, by Most Rev. Daniel J. Gercke, D.D., Bishop of Tucson. The co-consecrators were Most Rev. Thomas A. Connolly, D.D., Auxiliary Bishop of San Francisco, and Most Rev. Joseph T. McGucken, D.D., Auxiliary Bishop of Los Angeles.

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Most Rev. Francis J. Haas, D.D., Ph.D., LL.D., was consecrated and installed Bishop of Grand Rapids on November 18 in St. Andrew's Cathedral, Grand Rapids, by Most Rev. Amleto Giovanni Cicognani, D.D., Archbishop of Laodicea and Apostolic Delegate. The co-consecrators were Most Rev. Edward Mooney, D.D., Archbishop of Detroit, and Most Rev. Moses E. Kiley, D.D., Archbishop of Milwaukee. The sermon was preached by Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago.

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Most Rev. Arthur Landgraf, D.D., formerly Professor of Dogmatic Theology at The Catholic University of America, has been named Auxiliary Bishop of Bamberg, Germany.

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Rt. Rev. Raphael Heider, O.S.B., D.D., has been installed as Abbot of St. Martin's Abbey, Lacey, Washington. Most Rev. Gerald Shaughnessy, S.M., D.D., officiated at the blessing. The sermon was preached by Most Rev. Charles White, D.D., Bishop of Spokane. Most Rev. Edward D. Howard, D.D., Archbishop of Portland, was present in the sanctuary.

Most Rev. John Joseph van der Velden, formerly Rector of the Aachen diocesan seminary, has been named Bishop of Aachen.

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Most Rev. J. C. McGuigan, D.D., Archbishop of Toronto, has been appointed Assistant at the Pontifical Throne.

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Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans, has been named by the Governor of Louisiana a member of the Advisory Committee to the Department of Institutions.

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Most Rev. Joseph P. Lynch, D.D., Bishop of Dallas, has been appointed chaplain on the Staff of the Governor of Texas.

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On October 29th, at the 100th annual commencement at Notre Dame University, the degree LL.D. was conferred on Most Rev. William P. O'Connor, D.D., Bishop of Superior, Governor Frank Kelly of Michigan, and Leo T. Crowley, United States Foreign Economic Administrator.

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Very Rev. Vincent L. Keelan, S.J., has been named the first Provincial of the Maryland Province of the Society of Jesus, established earlier this year by a division of the Maryland–New York Province.

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Rt. Rev. Msgr. August R. Thier has been appointed Vicar for Religious in the Archdiocese of Dubuque.

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Very Rev. E. J. Szumal has been named Rector of SS. Cyril and Methodius' Seminary, Orchard Lake, Michigan.

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Very Rev. Msgr. James H. Griffiths, S.T.D., Vice Chancellor of the Diocese of Brooklyn, has succeeded as Chancellor of the Military Ordinariate, Very Rev. Robert E. McCormick, J.C.D., who has been appointed Officialis of the Archdiocese of New York. Rev. Joseph M. Egan has been appointed Assistant Chancellor.

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Rt. Rev. Jeremiah F. Minihan has been named Chancellor of the Archdiocese of Boston.

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Rev. Adolph Marx, J.C.D., has been appointed Chancellor of the Diocese of Corpus Christi.

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Rev. Leo J. Franey has been named Chancellor of the Diocese of Rockford.

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Fordham University conferred the degree LL.D on Chen Li-fu, China's Minister of Education. The degree was accepted by Wei Tao-ming, Chinese Ambassador in the United States.

Chief Justice John P. Higgins, of the Massachusetts Superior Court, a prominent Catholic, has been appointed by the Governor to the interfaith committee to study the recent anti-Semitic disorders in Greater Boston.

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Rev. Edward E. Swanstrom, Ph.D., has been appointed Assistant Executive Director of the National Catholic Welfare Conference War Relief Services.

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Rt. Rev. Msgr. William D. Cleary, Colonel in the Army Chaplain Corps, was invested as Domestic Prelate by Most Rev. John F. O'Hara, D.D., Military Delegate.

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The following priests have been named Domestic Prelates: Diocese of Richmond, Rt. Rev. Msgrs. Leo J. Ryan, V.G., F. P. Lackey, James A. Brennan, and William A. Gill; Diocese of Erie, Rt. Rev. Msgrs. Francis J. Wagner, Stephen H. Cauley, August Hoeing, John W. Murphy, and Francis A. Robaczewski; Diocese of Harrisburg, Rt. Rev. Msgrs. Joseph Schmidt and Charles J. Tighe; Diocese of Alexandria, Rt. Rev. Msgrs. Francis J. Plutz and John V. Plauche. Very Rev. James E. Howard, of the latter Diocese, has been named Papal Chamberlain.

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Mrs. Augustine E. Coolot of Sacramento, California, has received the Papal Medal *Pro Ecclesia et Pontifice.*

THE CANON LAW SOCIETY OF AMERICA

The Canon Law Society of America convened for its fifth annual meeting at 3:00 P. M., on November 14, 1943, at the Hotel Pennsylvania in New York City. Despite travel hardships some sixty members were in attendance.

The Rev. James P. Kelly, J.C.D., as President of the Society presided at the meeting. Upon the reading of the minutes of the previous annual meeting on November 15, 1942, and their subsequent adoption by the assembly, the President reported on the Society's activity during the past year. Regional meetings at which a paper on some important practical canonical topic was read, with time being set aside thereafter for open floor discussion, were held in various parts of the country: at New York, two; at Washington, D. C., two; at Saint Louis, Missouri, one; at Portland, Oregon, one. The hope was expressed by the President that this kind of activity might continue, and also that it might come into use in still other parts of the country.

The silver jubilee of the enactment of the Code of Canon Law was fittingly commemorated on May 16, 1943, at the National Shrine of the Immaculate Conception, Washington, D. C., with a solemn pontifical mass at which His Excellency, The Most Reverend George L. Leech, Bishop of Harrisburg, officiated, and at which Monsignor James H. Griffiths, S.T.D., Vice-Chancellor of the Diocese of Brooklyn, delivered the laudatory address.

In New York and Washington the customary annual "Red Mass" celebration was observed. In New York a series of seven lectures on the Code

of Canon Law was inaugurated on October 25, 1943, with the closing lecture to be held on February 28, 1944. In Washington a similar course of lectures was begun on November 5, 1943. Its series of fifteen lectures was to close on February 25, 1944. In Camden a series of five lectures was planned to be given during the months of November and December. Reports had also come from other dioceses in which at meetings or clerical conferences the silver anniversary in the life of the Church's Code of law was duly commemorated.

The Rev. Clement Bastnagel, J.U.D., of The Catholic University of America Canon Law Faculty, made the Treasurer's report. During the year from November 15, 1942, to November 14, 1943, the Society had received from membership subscriptions ($2,246.40) and through interest ($36.52) a total of $2,282.92. Total expenditures amounted to $2,036.40. Thus there remained a favorable balance of $246.52. But the Society had on hand on November 15, 1942, the sum of $1,137.10. The present balance, then, was $1,383.62. Of this amount $1,000.00 was bearing interest from July 1, 1943.

Within the year the Society had purchased and distributed 19 dissertations (4,225 copies) at the cost of $1,497.01. The remainder of the expenditures ($539.39) covered such needs as the defraying of expenses in connection with the holding of two regional meetings both in New York and Washington, the arrangement of a lecture series at Washington, the festive celebration in Washington of the Jubilee Commemoration, and the general conduct of correspondence, from the President's and Treasurer's offices, with the membership of the Society. For the 13 dissertations (3 from the 1942 list, and 10 from the 1943 list) which the Society was still to acquire and distribute, there was available for the Society its present balance of $1,383.62. A total number of 3,725 copies was thus to be obtained in order to be mailed to the subscribers as soon as the dissertations had been received from the printer.

In view of the Treasurer's recommendation the Society agreed that a $7.00 membership fee in the Society would entitle the subscriber to receive as many as 15 copies to be selected by him from the 1944 list of approved dissertations. For copies in excess of 15 the subscriber would be asked to pay a half-dollar apiece. The Society furthermore established that the minimum membership fee of $2.00 would entitle the subscriber to any 4 copies selected by him from the 1944 list. For individual copies in excess of these 4 the price of a half-dollar apiece was to be paid. These provisions were made in order that the Society might have the sense of security of being able to meet the current year's expenses out of the current year's income, and would not have to look to the advance income for a subsequent year in order to meet obligations of the previous year.

The present membership in the Society was reported as standing at 345, with at least 20 of the Society's members resident in Canada.

The Very Reverend Stephen C. Gulovich, D.D., Ph.D., Chancellor of the Greek Rite Diocese of Pittsburgh, read a paper to the assembled members upon the close of the business meeting of the Society. In his paper Dr. Gulovich offered a detailed exposition of the law regarding the juridical form required for the contracting of marriage as this law now obtains in the various Oriental rites. The open discussion which followed upon the reading of the

paper revealed some recent decisions of the Sacred Oriental Congregation in particular cases which had been submitted to the Congregation for a proper solution.

When the discussion was ended the members of the Society looked to the election of officers for the ensuing year. Drs. James P. Kelly, Eugene A. Dooley, O.M.I., Francis B. Donnelly and Clement V. Bastnagel, President, Vice-President, Recording Secretary and Treasurer of the Society, were authorized by the voting body to nominate the candidates for the various offices. For the office of President the candidates were: The Very Rev. Robert E. McCormick, of New York, the Rev. Francis A. McQuade, S.J., of New York, and the Rev. Jerome D. Hannan, of the Canon Law Faculty of The Catholic University. Monsignor McCormick was elected, and thereupon was welcomed to the presiding officer's chair. Candidates for the office of Vice-President were: The Rev. Thomas H. Kay, of Albany, the Rev. Stanley E. Fedewa, of Detroit, and the Rev. Richard J. Kearney, of Philadelphia. Father Kay was elected. The candidates for the office of Recording Secretary were: The Rev. Francis E. Moriarty, C.SS.R., of New York, the Rev. John F. Dwyer, of Rochester, and the Rev. John L. Hammill, of Ogdensburg. Father Moriarty was elected.

For the offices of General Secretary and Treasurer the presiding officer submitted the names of the Rev. John R. Schmidt and the Rev. Clement V. Bastnagel, both of the Canon Law Faculty of The Catholic University, for general acceptance. This suggestion met with the approval of the voting assembly.

Before the meeting's adjournment Monsignor McCormick the new President of the Society, in the name of the elected officers, pledged the energies of the Excutive Committee to the task of upholding and promoting the Society's aims and interests throughout the Committee's tenure of office during the subsequent year.

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The Canon Law Society of America and The Catholic University of America observed the twenty-fifth anniversary of THE CODE OF CANON LAW with a Pontifical Mass at the Shrine of the Immaculate Conception on May 16, ushering in the jubilee year commemorating the historic event. As a fitting program for this memorial year they have also scheduled a series of fifteen lectures on Canon Law to be given by the Faculty of the School of Canon Law of The Catholic University of America on Friday evenings at 8:00 o'clock in the Law School of The Catholic University of America.

The dates and the topics of the lectures and the names of the respective lecturers are presented herewith.

November 5. *Sources and Agencies of Canon Law—The Code of Canon Law*
Stephan Kuttner, J.U.D., Professor of the History of Canon Law

November 12. *Natural Law in the Code of Canon Law*
Willibald M. Plöchl, J.U.D., Visiting Professor of Oriental Canon Law

November 19. *History of the Codifications of Canon Law*
Dr. Kuttner

November 26. *The Interpretation of Canon Law*
Rev. John R. Schmidt, J.C.D., Research Assistant in Canon Law

December 3. *Great Canonists: Historical Jurisprudence*
Dr. Kuttner

December 10. *The Code of Canon Law and Oriental Rites*
Dr. Plöchl

December 17. *Municipal Law in The Code of Canon Law*
Rev. Jerome D. Hannan, LL.B., J.C.D., Associate Professor of Canon Law

January 7. *Legal Capacity in The Code of Canon Law*
Rev. Clement V. Bastnagel, J.U.D., Associate Professor of Canon Law

January 14. *Corporate Personality in The Code of Canon Law*
Brendan F. Brown, LL.M., Ph.D., J.U.D., Acting Dean, The School of Law, The Catholic University of America

January 21. *Penology in The Code of Canon Law*
Very Rev. Hubert L. Motry, J.C.D., Dean of the School of Canon Law, The Catholic University of America

January 28. *The Law of Property and Obligations in The Code of Canon Law*
Dr. Hannan.

February 4. *The Law of Marriage in The Code of Canon Law*
Dr. Bastnagel

February 11. *The Rules of Procedure in The Code of Canon Law*
Dr. Motry

February 18. *The Canon Law of Wills*
Dr. Hannan.

February 25. *The Rules of Evidence in The Code of Canon Law*
Dr. Motry

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More than 250 members of the New York bench and bar heard the first of a series of seven lectures on THE CODE OF CANON LAW on Monday evening, October 25th, in the Auditorium of the Bar Association. These lectures are being sponsored by the Guild of Catholic Lawyers and The Canon Law Society of America in commemoration of the twenty-fifth anniversary of THE CODE. The Honorable John T. Loughran, senior associate judge of the Court of Appeals of the State of New York, presided at the meeting. The Very Reverend William R. O'Connor, S.T.L., Ph.D., Professor of Dogmatic Theology at St. Joseph's Seminary, Dunwoodie, and a judge of the Ecclesiastical Tribunal of the Archdiocese of New York, was the lecturer.

The schedule of the subsequent lectures follows:

[November 22, 1943]

2. *The General Norms of Canon Law* (Book I of the Code—Normae Generales)

   The Reverend Francis J. Murphy, S.T.D., Professor of Moral Theology and Canon Law at St. Joseph's Seminary and a Judge of the Ecclesiastical Tribunal of the Archdiocese of New York.

[December 20,1943]

3. *Persons and Juridical Personalities in Canon Law* (Book II of the Code—De Personis)

   The Very Reverend Eugene Dooley, O.M.I., J.C.D., Superior of the Oblate House of Philosophy, Newburgh, New York, and retiring Vice-President of The Canon Law Society of America.

[January 10, 1944]

4. *Things in Canon Law* (Book III of the Code—De Rebus)

   The Very Reverend Francis X. McQuade, S.J., J.C.D., Pastor of the Church of St. Ignatius, New York City, and Moderator of the Theological Conferences of the Archdiocese of New York.

[January 31, 1944]

5. *Marriage, Divorce, and Annulments*

   The Reverend James P. Kelly, J.C.D., Judge of the Ecclesiastical Tribunal of the Archdiocese of New York, and retiring President of The Canon Law Society of America.

[February 14, 1944]

6. *The Judiciary Department of the Church* (Book IV of the Code — De Processibus)

   The Right Reverend Monsignor Edward V. Dargin, J.C.D., Officialis of the Archdiocese of New York.

[February 28, 1944]

7. *Crimes and Punishments* (Book V of the Code—De Delictis et Poenis)

   The Reverend John M. Costello, J.C.D., Judge of the Ecclesiastical Tribunal of the Archdiocese of New York.

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A series of five lectures was arranged by Most Rev. Bartholomew J. Eustace, D.D., Bishop of Camden, in which various phases of Canon Law of special interest to practising attorneys were discussed. Rev. Augustine T. Mozier, M.A., Secretary to the Bishop, reports very satisfactory attendance, with many of the leading jurists of the county present at all the lectures.

[November 10, 1943]

"The History and Codification of the Canon Law", Rev. Joseph A. M. Quigley, M.A., M.S., J.C.D., Saint Charles' Seminary, Overbrook, Philadelphia, Pa.

[November 17, 1943]

"A Comparison of the Juridical Institutions of the Common and Canon Laws", Brendan Brown, D.Phil. (Oxon.), LL.M., J.U.D., Acting Dean of The School of Law, The Catholic University of America.

[November 24, 1943]

"The Canon Law of Marriage", Rev. James P. Kelly, J.C.D., Pro-synodal Judge, Archdiocese of New York.

[December 1, 1943]

"The Canon Law of Property", Rev. John C. Ford, S.J., M.A., LL.B., S.T.D., Weston College, Weston, Mass.

[December 8, 1943]

"The Canon Law of Wills", Rev. Jerome D. Hannan, S.T.D., LL.B., J.C.D., Associate Professor of Canon Law, The Catholic University of America, Washington, D. C.

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The Northwest Regional Meeting of the Canon Law Society of America was held at the Portland Hotel, Portland, Oregon, on Wednesday, September 8, 1943, from 10:00 a. m. to 1:00 p. m., Rev. Thomas J. Tobin, J.C.D., presiding. The paper was read by Rev. Leo J. Linahen, J.C.D., and dealt with absolution (*in alterutro foro*) *a censuris vel specialissimo modo reservatis vel ab homine incussis impertienda*, and included general notions on (1) censures, a. *a iure*, b. *ab homine;* (2) their reservation, and (3) their absolution. Specific treatment was given (1) censures *specialissimo modo* reserved and (2) precepts of a bishop. Special study was devoted to the question: Are all precepts of a bishop reserved? with special reference to canon 2245, § 4. The conclusion was that episcopal precepts are not necessarily reserved. The *casus urgentior* (canon 2254, § 1) was also specially considered.

Those present were Rev. Thomas J. Tobin, J.C.D., Very Rev. William J. Doheny, C.S.C., J.U.D., Rev. C. Peter Curran, O.P., S.T.D., Rev. John Prince, J.C.D. (Spokane), Rev. Charles Kerin, S.S., J.C.D. (St. Edward's Seminary), Rev. James Brennan, S.S., J.C.D. (St. Edward's Seminary), Rev. Leo J. Linahen, J.C.D. (Portland), Rev. Gerald Linahen (Portland), Rev. James J. Donovan, J.C.D. (Great Falls), Rev. Thomas G. Brockhaus, O.S.B., J.C.L., Rev. Cornelius M. Power, J.C.D. (Seattle).

It was decided that another meeting be held next year in Seattle, and that the chairman for that meeting would be Father James Brennan, S.S., J.C.D., and the secretary would be Father Cornelius M. Power, J.C.D.

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On Pentecost, June 13, 1943, the silver jubilee of The Code of Canon Law was observed in the Diocese of Hawaii by special sermons preached in all the churches of the Diocese at the direction of the Most Reverend Bishop. Outlines of the sermon were printed in the diocesan paper.

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On September 11, Most Reverend Edwin V. O'Hara, D.D., preached to some three hundred lawyers in the Cathedral at Kansas City, at a solemn Mass commemorating the silver jubilee of The Code of Canon Law.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

1. a. Date: October 28, 1943.
   b. Title: The Knowledge of Roman Law in the Medieval Church.
   c. Author: Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America.
   d. Abstract: Dr. Kuttner discussed the difference between the Western and Eastern churches in their respective attitudes toward the sources of Roman legislation, the channels by which the Roman sources were known in the Western church during the Middle Ages, the growth of Roman law studies among the clergy during the Gregorian Reform, the influence of the Roman Law Glossators in Bologna upon the beginnings of Canon Law schools, and the method of using Roman Law sources as elements of canonical doctrine among the Canon Law Glossators.

2. a. Date: November 24, 1943.
   b. Title: Some Aspects of the Restitution of Usury in the Later Middle Ages.
   c. Author: Mr. Benjamin N. Nelson of New York City.
   d. Abstract: The point of departure for a realistic depiction of the changing relevance of the Church's anti-usury program in the Middle Ages must be a careful consideration of how successive generations of commentators and administrators defined the principal terms and mandates of the fragmentary restitution legislation, laid down from the II Lateran Council (1139) to the Council of Vienne (1311-12): "restitution," "manifest usury was the cryptic c. 5 (*Cum tu*), X, *de usuris*, V, 19, of etc. Why, by whom, to whom, when, how much, in what order, by what auspices, under what sanctions, through what courts was restitution to be made?

   The only rule designating the recipients of restitution of usury was the cryptic c. 5 (*Cum tu*, X, *de usuris*, V, 19, of Alexander III (1158-81). Mr. Nelson illustrated how its cues were adjusted in teaching and in practice to a variety of novel predicaments resulting frequently in evasions and distortions of the restitution program, which are otherwise suggested by contemporary complaint and by a study of the wills and testaments of the outstanding merchants and bankers of the key economic areas of Europe from the twelfth through the sixteenth century.